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In The

Supreme Court of the United States

October Term, 1998

HOWARD R. BROADMAN,
a Judge of the Superior Court for Tulare County, California,

Petitioner,

vs.

CALIFORNIA COMMISSION ON
JUDICIAL PERFORMANCE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment's speech and press clauses limit the power of a state to punish a sitting judge who gives two extrajudicial media interviews and briefly references two cases no longer pending before him but still on appeal, when there is no record evidence nor factual finding that the interviews could or did interfere with the impartial administration of justice.

2. Whether a state may disregard the "strict scrutiny" test or the "substantial likelihood of material prejudice" standard of *Gentile v. State Bar of Nevada* in punishing a sitting judge for extrajudicial speech, in favor of the "general lines of analysis" for balancing speech rights of public employees articulated in *Pickering v. Board of Education*.

3. Whether a Canon of Judicial Ethics providing that "judges should abstain from public comment about a pending or impending proceeding in any court" is impermissibly overbroad and vague under the First Amendment and the due process clause.

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Petitioner, Howard R. Broadman, Judge of the Superior Court for Tulare County, State of California ("Judge Broadman"), respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the California Supreme Court, addressing and rejecting Judge Broadman's federal constitutional challenges, is reported as *Broadman v. Commission on Judicial Performance*, 18 Cal. 4th 1079 (1998) (App. A and B). The California Supreme Court's jurisdiction to hear the case was derived from the California Constitution, Article VI, former section 18(c), and the Decision and Recommendation of the State of California Commission on Judicial Performance, *Inquiry Concerning a Judge No. 108 (Judge Howard R. Broadman)* (August 22, 1996) (App. C).

STATEMENT OF JURISDICTION

The judgment below was entered and filed on August 10, 1998. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1257, because petitioner raised and preserved, and the highest court of the state specifically rejected, a constitutional claim.

CONSTITUTIONAL PROVISIONS AND RULE AT ISSUE

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise of speech thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The former California Code of Judicial Conduct, canon 3A(6) (in force at the time of Judge Broadman's targeted public comments and at the time the California Commission on Judicial Performance began Formal Proceedings in this case[1]), provides:

> Judges should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to their direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

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1. The current rule on this issue in California reads, "[a] judge shall not make any public comment about a pending or impending proceeding in any court . . . ," and has been redesignated as canon 3B(9).

STATEMENT OF THE CASE

The fundamental question here is the extent of the power of a state to punish a judge for comments made to and reported by the media regarding a case no longer before that judge. It arises from disciplinary proceedings instituted against Judge Broadman by the California Commission on Judicial Performance ("the Commission").

Judge Broadman is a trial judge. A number of his "innovative sentencing" rulings have attracted national media attention. As conditions of probation, Judge Broadman has ordered defendants to attend Alcoholics Anonymous meetings, or quit smoking, or obtain psychiatric help, or take Antabuse to deter alcohol consumption, or learn to read. One noteworthy case involved a condition that the defendant wear a T-shirt reading "My Record and Two Six Packs Equal Four Years" on the front and "I am on Felony Probation for Theft" on the back. Judge Broadman and his innovative sentencing approach have been both praised and panned by media commentators.

Media attention increased as a result of two particular "innovative sentencing" cases. In *People v. Zaring*, the female defendant pleaded guilty to possessing and being under the influence of heroin. Judge Broadman placed her on probation, effective upon her admission to a drug rehabilitation program. He also ordered as a condition of probation that Ms. Zaring not get pregnant. Judge Broadman explained, "I'm afraid that if you get pregnant we're going to get a cocaine/heroin-addicted baby." He also explained that the "no pregnancy" condition could be reconsidered after her completion of a drug rehabilitation program. The issue soon became academic; Ms. Zaring's probation was revoked for a different reason about

two months thereafter. The case was out of Judge Broadman's courtroom by November 29, 1990 and was later appealed.[2]

The national media also focused on a probation condition imposed by Judge Broadman in *People v. Johnson*. Ms. Johnson pleaded guilty to three felony counts of child abuse. She was pregnant with her fifth child at her sentencing hearing on January 2, 1991. Judge Broadman asked Ms. Johnson (represented by counsel) if she wanted to get pregnant again. When she replied "no," Judge Broadman ordered as a probation condition surgical implantation of the then newly-approved Norplant contraceptive device. Ms. Johnson appeared at a subsequent hearing and requested the condition be removed. Judge Broadman denied the request, but stayed imposition of that condition pending appeal.

On March 4, 1991, a few months after *Zaring* and *Johnson* were out of Judge Broadman's courtroom, a man named Ray Bodine sitting in Judge Broadman's courtroom gallery during a routine trial pulled out a .357 Magnum and fired at Judge Broadman's head while he sat on the bench. The bullet missed by a matter of inches and the gunman was subdued. Bodine's attempted assassination was a protest against Judge Broadman's previous Norplant order.

About ten days after the shooting (March 14, 1991), a reporter from *West* magazine interviewed Judge Broadman. Judge Broadman talked extensively about the assassination attempt. He also briefly responded to questions about *Johnson* and *Zaring* and other past cases.

About four days after the *West* interview, the California Commission on Judicial Performance sent a "preliminary

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2. *See People v. Zaring*, 8 Cal. App. 4th 362 (1992).

investigation" letter to Judge Broadman alleging he had granted interviews about *Johnson* to television stations and newspapers, including CNN Headline News, the *San Francisco Daily Journal*, the *New York Times*, the NBC Today Show, the CBS This Morning Show, 20/20, and 60 Minutes. The letter stated that a notice of appeal had been filed in *Johnson* on January 30, 1991 and alleged that Judge Broadman's public comments violated canon 3A(6) of the California Code of Judicial Conduct.

Judge Broadman sent the Commission a written response on April 4, 1991. He denied seeking media attention and reported that he had declined invitations to appear on Larry King Live, Oprah, the Phil Collins Home Show, Sally Jessie Raphael, 20/20, Geraldo, and Jane Pauley. He conceded that he had given interviews to the *New York Times*, the NBC Today Show, the CBS This Morning Show, and 60 Minutes. He claimed that he had not violated canon 3A(6) in this regard because (in his view) the canon suggests he could explain the procedure of the court, including remarks about issues already decided in court. He also made the following remarks:

> The American Bar Association 1990 Draft Model Code proposes a slightly different formulation. It proposes the following language:
>
> > A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing.
>
> I believe my actions were in conformity with both the current law as well as the Model Code. However,

> the Model Code does seem to grant more first amendment protection to the public's right to know and understand judicial proceedings. The judiciary, of course, gives up some of its rights, and I believe that my actions were mindful of the appropriate limitations. My comments were intended to protect the high standards of the judiciary, not myself.

Judge Broadman also informed the Commission he would recuse himself if *Johnson* came back to him, considering the assassination attempt and media's linkage of the case to him personally.

On May 16, 1991, the Commission sent Judge Broadman a letter stating it was ending its preliminary investigation because the facts did not constitute grounds for proceeding further. Notwithstanding that statement, the Commission referred to this notice as an "advisory letter." It told Judge Broadman that his media statements violated canon 3A(6), "detracted from the appearance of impartiality and fairness during the pendency of the proceedings," and "gave rise to the perception that you actively sought the publicity about your decision."

The *West* article (for which Judge Broadman was interviewed before notification of the Commission's preliminary investigation) was published on July 7, 1991.

In November 1991, Judge Broadman was approached for an interview by Janice Castro of *Time*. She wanted to write about the role judges play in criminal sentencing. She sought out Judge Broadman after hearing about the attempted shooting. She also had read that Judge Broadman "seemed to put a great deal of thought into sentencing and [Ms. Castro] thought he would be a good person to talk to that [so she] might gain some

insight into how that works." On Ms. Castro's first attempt, Judge Broadman said he would not give an interview. She called back a second time offering a "question and answer" ("Q & A") format to be printed verbatim. Judge Broadman understood that the interview would be about his judicial philosophy and not *Johnson*, which he told Ms. Castro he would not discuss. He finally agreed to the interview, but with little enthusiasm. During the interview, Ms. Castro brought up *Johnson* and described it in a manner Judge Broadman felt was misleading. He corrected Ms. Castro on one point. She asked several follow-up questions about the case; Judge Broadman answered. When asked if the case was on appeal, Judge Broadman simply replied: "Yes. Everyone has the right to appeal my decisions. Several are doing so."

The Q & A interview, entitled "A Judge Whose Ideas Nearly Got Him Killed," was published by *Time* in its March 9, 1992 issue.

Johnson became final on April 19, 1992, when her appeal was dismissed as moot.

By May 1992, Judge Broadman found himself again replying to a Commission preliminary investigation letter about his public comments, this time concerning the *Time* interview.

Zaring was resolved on July 22, 1992, with a published opinion affirming the conviction but reversing the "no pregnancy" probation condition as overbroad.

The Commission brought Formal Disciplinary Proceedings against Judge Broadman on a number of grounds, including Sub-Counts regarding public comments on *Johnson* and *Zaring*.[3] Judge Broadman's Answer alleged as an affirmative

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3. Only the "public comment" Sub-Counts are relevant to this petition.

defense, "[t]he acts complained of were the exercise of the reasonable expression of respondent's First Amendment rights." At the hearing before the Commission, Judge Broadman admitted making the statements alleged in Sub-Count 2B regarding the *Time* interview and in Sub-Count 2C regarding the *West* interview. He conceded that both comments violated canon 3A(6).[4]

The Commission concluded that the allegations in Sub-Count 2B were proven and constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The statements that violated canon 3A(6) were only generally identified as "inappropriate comments about the pending *Johnson*/Norplant case." One example was identified:

> To illustrate the nature of the comments, the Time Magazine article quotes Judge Broadman as stating:
>
> > Would it have been better simply to lock her up? In my heart, I felt it was compassionate. She was flunking parenting. She needed help. She needed to take care of the child she was bearing and to complete the conditions of her probation. I thought if there was less stress on her, if she did not have still another child right away, that she might be able

4. Constitutional questions regarding the validity of canon 3A(6), on its face and as applied in this case, were not briefed nor addressed before the Commission. Only the California Supreme Court may rule on the constitutional challenges. *See Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 833, n.3 (1990). Moreover, the Commission, as a constitutionally-created administrative agency, has no lawful power under California law to declare a statute unenforceable or unconstitutional. Cal. Const., art. III, § 3.5.

> to do all these things. I kept her in the community. I sentenced her to 365 days in the county jail, and parenting classes and mental-health counseling. I thought it would help her.

App. 60a-61a (footnote 9). The Commission did not find the *Time* interview had any effect whatsoever on the *Johnson* appeal, or that the interview had a substantial likelihood of materially prejudicing the case at the time it was given.

The Commission also concluded that the allegations in Sub-Count 2C were proven and constituted "prejudicial conduct." Here, the Commission identified the specific offending comments, making reference to three statements in the *West* article:

> With regard to the Linda Zaring case, Judge Broadman asked [the interviewer], "Have you heard the horrible story about the lady I sent to prison?"
>
> In response to [the interviewer's] questions about his Norplant decision, Judge Broadman responded, "There's no question that (Norplant) is an invasion, but judges do that all the time."
>
> In response to [the interviewer's] questions regarding why he didn't ask about Darlene Johnson's religious views of birth control, Judge Howard Broadman responded, "She is Baptist . . . If someone was Catholic and it was against their religion . . . You're asking me to speculate."

App. 61a-62a. The Commission did not find the *West* interview had any effect whatsoever on the *Johnson* or *Zaring* appeals, or that the interview had a substantial likelihood of materially prejudicing those cases at the time it was given.

Based on findings of four acts of "prejudicial conduct" (two of which involved public comment), the Commission recommended that the California Supreme Court issue a Public Censure. The two violations of canon 3A(6) (particularly after the previous Commission advisory letter on the subject) were prominently discussed as reasons for the Commission's recommendation.

The First and Fourteenth Amendment considerations regarding the "public comment" Sub-Counts were briefed before the California Supreme Court. Judge Broadman argued that canon 3A(6) on its face was impermissibly broad and void for vagueness, citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). He further argued that canon 3A(6) was unconstitutional as applied to him in this case, contending that the *Gentile* "substantial likelihood of material prejudice" test was applicable and had not been met.

The California Supreme Court's opinion focused primarily on what analysis should be applied to the First Amendment claims — the "substantial likelihood of material prejudice" standard under *Gentile*, or the more liberal balancing test between a public employee's speech rights and a public employer's interests under *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Court chose to apply the *Pickering* balancing factors, rejecting the *Gentile* standard because it purportedly "affords insufficient protection to the state's interest in both the fact and the appearance of judicial impartiality and integrity." App. 24a.

In applying *Pickering*, the Court determined canon 3A(6) represented only a narrowly drawn restriction on judicial free speech. App. 26a. On the other hand, the judge's employer — state government — had a "compelling public interest in maintaining a judicial system that both is in fact and is publicly

perceived as being fair, impartial, and efficient." As regarding cases pending before the judge in question, public comments *may* give the appearance that the judge had prejudged the merits, had become an advocate for one side, or had resorted to extrajudicial means to defend the judge's own rulings. As regarding cases not pending before the judge in question, public comments may appear to exert pressure on another judge to decide a matter in a particular way. App. 26a.

In sum, the Court concluded that *all* extrajudicial public comments made by any judge on any pending case are properly censored under *Pickering*, with no need for specific factual findings establishing any harm from the comments. In a footnote, the Court speculated that its conclusion of constitutional validity of canon 3A(6) would also be reached under the *Gentile* standard. It did not explain how that standard could be met in Judge Broadman's case in light of no findings of potential or actual harm from his comments. Finally, the Court found no vagueness problem with the canon's use of the word, "public."

Accordingly, Judge Broadman received a Public Censure, including findings that he had committed "prejudicial conduct" by making statements in violation of canon 3A(6). This discipline can be used in any future disciplinary proceedings against Judge Broadman as an aggravating factor supporting additional discipline, including removal from office.[5] Under California Constitution, Article VI, section 18.5, the text of Judge Broadman's Public Censure must be provided on request to the Governor of any State or the President of the United States if relevant to consideration for any additional judicial appointment.

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5. *McCullough v. Commission on Judicial Performance*, 49 Cal. 3d 186, 199 (1989).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE REGULATION OF JUDICIAL SPEECH OUTSIDE OF COURT RAISES FUNDAMENTAL AND UNRESOLVED ISSUES UNDER THE FIRST AMENDMENT.

As never before, American society hungers for commentary about ongoing trials and legal developments. Daily newspapers exclusively devoted to legal issues thrive. 24-hour news channels broadcast daily programs devoted solely to current legal events. Cable systems offer a channel devoted to nothing but court trials and legal matters. Legal rulings and investigative reports are released simultaneously on myriad web-sites. As a result, the public has the luxury of examining pending trials from a full range of perspectives: litigants, their lawyers, lawyer-pundits, law professors, professional media legal analysts, former jurors, retired judges, laypersons, chat room inhabitants. Everyone has an insight; everyone shares an insight. The public benefits.

One group noticeably is excluded from the public discourse — sitting judges. In most states, prohibitions on extrajudicial speech regarding pending trials cover not just the presiding judge(s), but all non-participating judges as well. Judges, however, perform perhaps the most significant, and least understood, role in the legal process. Accordingly, media requests for information and opinions from judges are increasing. Judges are not immune from basic desires of human nature: to opine, to educate, to be heard. Yet judges have an undisputed duty to act in a way that does not endanger the fairness of a trial or an appeal, whether pending before the judge or not. Many times, that means self-censorship of public comments. Judge Lance Ito observed:

> The sirens of mythology pale in comparison with the allure of seeing yourself on CNN. The results, however, can be about the same.[6]

The question this Court has never addressed is whether a state, through a regulation of judicial conduct, can displace a judge's personal discretion as to whether to comment publicly on a pending case. The more pertinent question is whether a state may impose an absolute ban on all judicial speech about a pending case regardless of whether there is any demonstrable danger from such speech. This Court has addressed that question as it relates to lawyers,[7] the press,[8] public officials,[9] grand jury witnesses,[10] and laypersons.[11] We urge this Court to complete the analysis by addressing the First Amendment rights of a judge to make extrajudicial comments about a pending case.

A. States need guidance on the recurring question of the power to discipline a judge merely for what the judge says about pending cases.

In the past four years, at least six state supreme courts have tackled the question of discipline of a judge for public comments. Last April, the Washington Supreme Court rejected

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6. B.J. Palermo, Profile: Lance A. Ito, He Helped Pick Simpson Judge, L.A. Daily J., July 19, 1994, at 1, 5 (quoting Judge Ito).

7. *E.g.*, *Gentile v. State Bar of Nevada*, *supra*.

8. *E.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

9. *E.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962).

10. *E.g.*, *Butterworth v. Smith*, 494 U.S. 624 (1990).

11. *E.g.*, *Bridges v. California*, 314 U.S. 252 (1941).

discipline of a judge who publicly promoted "the preservation and protection of human life" at a March for Life rally, just one hour after the judge was inducted into the Washington Supreme Court.[12] Rejection of the punishment recommendation came as a result of constitutional analysis:

> Judges do not forfeit the right to freedom of speech when they assume office. They do agree, however, that the right must be balanced against the public's legitimate expectations of judicial impartiality. But the constitutional concern weighs more heavily in that balance, requiring clear and convincing evidence of speech or conduct that casts doubt on a judge's integrity, independence, or impartiality in order to justify placing a restriction on that right.[13]

On the other hand, the New Jersey Supreme Court recently approved a disciplinary committee opinion holding that a New Jersey municipal court judge was prohibited from providing regular television commentary on Court TV and "Geraldo Live" concerning the California case of *People v. Simpson*. New Jersey, like many states, forbids a judge from making a public comment on a pending case. Though the judge in question was not disciplined, he was instructed that his constitutional rights did not permit continuation of his punditry. The Court reached this conclusion after extensive discussion about how a judge's individual constitutional rights should be balanced against state interests promoted by the judge's silence. The Court noted appellate courts' confusion as to the applicable standard, identifying various applications of a public-employee balancing test under *Pickering v. Board of Education*, *supra*, a strict-

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12. *In re Sanders*, 955 P.2d 369 (Wa. 1998).

13. *Id.*, 955 P.2d at 370.

scrutiny test, a hybrid *Pickering*/strict-scrutiny test, and a middle-tier scrutiny test under *Gentile v. State Bar of Nevada*, *supra*.[14]

West Virginia recently addressed a judge's public comments in two respects — punishing a judge for talking about a pending case on CNN's "Crossfire" (involving no First Amendment analysis)[15]; and saving the same judge from punishment for talking on the radio about the disciplinary case against him (involving a substantial First Amendment analysis).[16] Oregon[17] and Utah[18] also have addressed this issue recently.

Some states, following the relevant ABA Model Code provision, have incorporated into their "public comment" canons protections mirroring that in *Gentile*.[19]

In Judge Broadman's case, the California Supreme Court recognized, "[t]he United States Supreme Court has not yet

14. *In re Broadbelt*, 683 A.2d 543 (N.J. 1996), *cert. denied*, 520 U.S. 1118 (1997).

15. *In re Hey* ("*Hey I*"), 425 S.E. 2d 545 (W. Va. 1992).

16. *In re Hey* ("*Hey II*"), 452 S.E. 2d 24 (W. Va. 1994).

17. *In re Schenck*, 870 P.2d 185 (Or. 1994).

18. *In re McCully*, 942 P.2d 327 (Utah 1997).

19. *E.g.*, Texas Code of Judicial Conduct, canon 3B(9) ["a judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."]; Washington Code of Judicial Conduct, canon 3(a)(7) ["Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness . . ."].

considered what limits the First Amendment to the federal Constitution imposes on a state's authority to restrict judges from publicly commenting on pending cases." Yet, it was not persuaded that this Court's *Gentile* standard applies and prohibits the proposed discipline, reasoning that *Gentile* only applies to lawyers' speech; not judges' speech:

> . . . [W]e reject petitioner's proposed standard permitting judges to comment publicly on any pending case unless the particular comment poses a "substantial likelihood of material prejudice," for it affords insufficient protection to the state's interest in both the fact and the appearance of judicial impartiality and integrity.[20]

Accordingly, the current state of affairs is that the extent of a state court judge's federal First Amendment rights varies depending on what state the judge serves. The Texas judge has a federal right to make public comments about a pending New York case, but the California judge does not. The respective federal right, of course, is the same. Only the respective's state's interpretation of that right accounts for the diametrically opposed results.

The personal freedoms being suppressed by California and other states are significant. Free speech about such a significant public concern as the operations of our courts has been fervently protected by this Court time and again.

> It would be difficult to single out any aspect of government of higher concern and importance to the

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20. App. 21a-27a. The Court went on to contend its conclusion of misconduct would be the same under either the *Gentile* test or the *Pickering* balancing factors. App. 27a, n.6.

> people than the manner in which criminal trials are conducted.[21]

The different results, the different standards of analysis, need to be reconciled by the guidance of this Court, just as it has done regarding public comments by the other participants and observers of criminal cases. Judges' public comments are affected in both directions by the uncertainty. Some judges boldly speak out, trusting the supremacy of the First Amendment to triumph eventually over a restrictive ethical canon. Other judges feel the chill of the same canon that on its face leaves no avenue for personal expression about a pending case. Granting Judge Broadman's petition would settle now the multitude of future appeals in both the state and federal systems[22] likely to result from continuing uncertainty.

B. Questions of a state's judicial discipline practices have national implications regarding extrajudicial comment on pending cases.

While a state's punishment of its own judge normally is an internal affair, it has national implications when free speech rights are affected, particularly regarding a judge's media comments. As mentioned above, some states have no restrictions on their judges' ability to comment on cases to which they are not assigned. States applying some form of the "substantial likelihood of material prejudice" test also would be hard pressed in the usual case to show how one of its trial

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21. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (Burger, C.J.).

22. *See Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990) [holding that the Texas Commission on Judicial Conduct violated a judge's civil rights under 42 U.S.C. § 1983 by publicly reprimanding him for writing an "open letter" critical of court operations].

judge's comments could prejudice the outcome of a case on appeal in another state, or even before this Court. The result one day may well be that the public will benefit only from the views of judges from particular states, with judges from other states being uniformly silent. California cannot restrict what a Texas judge says about its cases. Indeed, the airways did not want for judicial comment about *People v. Simpson*. Public judicial comments cross a state's border as easily as they cross the street.

C. Judge Broadman's Public Censure presents a unique opportunity to shape the scope of a judge's First Amendment rights.

This petition should be granted because the facts of Judge Broadman's Public Censure present a near-perfect vehicle for drawing intelligible lines between individual free speech rights and the state's interests in guarding "the fact and appearance of judicial impartiality and integrity."

Unlike Judge Broadbelt in New Jersey, Judge Broadman was punished for his comments. His Public Censure was more severe discipline than was the private reprimand imposed on the lawyer in *Gentile*. Public Censure of a California judge is not just present punishment; it may be used in a later instance to discourage a higher judicial appointment or to remove that judge from office.

The record does not reflect that Judge Broadman personally sought out media attention. His comments were different than that of a mere judicial commentator not personally connected with the matter discussed. Judge Broadman *was* the story. Tragically, he was one of a handful of judges in American history to be targeted for assassination while on the bench. Fortunately, he was one of the rare judges to have survived the

attempt. While it is true that his judicial rulings made him the mark for the media's attention as well as the gunman's bullet, he was newsworthy nevertheless. His "innovative sentencing," particularly involving the use of Norplant, was going to be discussed with or without his comments. The media has not the patience for the appeal process to conclude.

> It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below produce their restrictive results at the precise time when public interest in the matters discussed would be naturally at its height.
>
> * * *
>
> No suggestion can be found in the Constitution that the freedom there guaranteed for speech and press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.[23]

California's basis for the punishment was an ethical canon that has many exact counterparts in other states. Yet, unlike some other states' parallel rule, the California canon does not contain any conditions for application that resemble the "substantial likelihood of material prejudice" test articulated in *Gentile*.[24]

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23. *Bridges*, *supra*, 314 U.S. at 268-269.

24. *Gentile*, *supra*, 501 U.S. at 1075 (Rehnquist, J.).

Moreover, California justified Judge Broadman's punishment under canon 3A(6) only by his simple act of speaking, not by any appreciable harm done. He did not speak out while either *Johnson* or *Zaring* were before him as the trial judge. The cases were on appeal at the time. One appeal later became moot, for reasons not connected with Judge Broadman's interviews. And Judge Broadman's "no pregnancy" probation condition was *reversed* in the other appeal. What few case-specific comments were identified by the Commission and the Court were not calculated nor reasonably expected to alter the cases' resolutions. There was not even a factual finding that the comments reflected adversely on the public's perception of judicial independence and impartiality. If anything, Judge Broadman's comments illustrated judicial independence.

As mentioned below, the California Supreme Court's opinion represents a practical total ban on substantive comments by its judges on any pending case — cases before the judge, once before the judge, before another California judge, or before a judge in another state or country. The contrast between the competing interests of the judge and the state is perhaps more vivid regarding Judge Broadman than in any past judicial misconduct case.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE STATE'S INTEREST IN PROTECTING THE REPUTATION OF THE JUDICIARY CANNOT IMPAIR OR CHILL A JUDGE'S EXTRAJUDICIAL PROTECTED SPEECH WITHOUT AT LEAST A SHOWING OF SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE TO A PENDING TRIAL OR APPEAL.

States and scholars are split as to the proper standard for determining whether a judge may be punished for publicly commenting on a pending case. The New Jersey Supreme Court identified four different approaches used thus far. It chose the *Gentile* test. California rejected that test in this case by distinguishing judges from lawyers. The Court reasoned that judges, as neutral arbiters rather than advocates, are considered by the public as more authoritative sources of information. Because judges have greater influence over public opinion, there is a greater threat from inappropriate public comments. False public impressions, the Court contends, could also result if a commenting judge is perceived to be an advocate.[25] California chose the *Pickering* "public employee" analysis. Other courts take California's approach.[26]

Legal commentators express support for several standards. Professor Chemerinsky suggested that "strict scrutiny" should be applied, considering that prohibiting comments only about *pending* cases "is clearly a content-based restriction." While also acknowledging potential application of *Pickering*, he concluded there was a "strong argument" that the *Gentile*

25. App. 22a-23a.

26. *E.g.*, *Schenck*, *supra*, 870 P.2d at 204; *Hey II*, *supra*, 452 S.E. 2d at 30-31.

standard is the best approach.[27] Professor Gross was one of the first proponents of using the *Pickering* analysis, though he identified several reasons why a judge was more than just a regular public employee.[28] It is also worth noting that his article pre-dates *Gentile*. Professor Ross, while conceding that determination of a proper interests balancing test was beyond the scope of his article on extrajudicial comment, nevertheless observed that ". . . the First Amendment surely seems to require the preservation of a high threshold for the imposition of sanctions."[29]

Judge Broadman respectfully disagrees with the California Supreme Court that the standard selected makes no difference in his case. Because there was never a finding of fact that his comments caused any appreciable harm to any case, it seems apparent that application of a "strict scrutiny" or a "substantial likelihood of material prejudice" test would have made discipline of Judge Broadman difficult, if not impossible.

The concern for this Court is that there inevitably will be more Judge Broadman's in the future, raising and litigating their defenses under the First Amendment. Different tests will yield different levels of protection for free speech around the country. Regardless of the analysis preferred by this Court, standard guidelines are needed by judicial conduct commissions, reviewing courts, and the judges who must make daily decisions as to what or what not to discuss in public.

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27. Erwin Chemerinsky, *Is it the Siren's Call?: Judge and Free Speech While Cases are Pending*, 28 LOY. L.A. L. REV. 831, 842 (1995).

28. Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986).

29. William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 596 (1989).

III.

THE PETITION SHOULD BE GRANTED BECAUSE CANON 3A(6) IS OVERBROAD AND VAGUE.

A. California applies an overbroad blanket ban on all judicial speech about a pending case.

The California Supreme Court went beyond holding that the federal Constitution permits punishing Judge Broadman for his particular media comments. The Court applied the *Pickering* test not to his scant comments in the *Time* and *West* articles, but to all judicial comments on pending cases *in general*. The Court looked not to Judge Broadman's personal interests in talking about the case that "nearly got him killed," but rather to a "general interest of judges in making public comments on court proceedings."[30] Clearly, the Court concluded that all substantive public comments on pending cases by a judge could be punished under *Pickering*, regardless of individual circumstances.

As a result, a California judge can be punished for making any comment in public (critical, supportive, or neutral) about any pending legal proceeding in the world.

> The fact that some of the statements forbidden by the rule . . . are within the state's regulatory power does not save the rule. A statute that forbids, or can fairly be read to forbid, privileged speech is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter.[31]

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30. App. 26a.

31. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 230 (7th Cir. 1993).

Judge Broadman requests that his petition be granted to determine whether canon 3A(6) is overbroad on its face.

B. Since not all judicial public comments on pending cases are punished, a California judge is left to guess about the rule's scope.

California judges routinely make public comments on pending cases, some even in the media. Two days before Judge Broadman's hearing before the Commission, the chair of the Commission, himself an appellate justice, gave a media interview in which he discussed the lack of merit of one of Judge Broadman's defenses:

> I am going to put the matter up to the other commissioners, and then I shall leave the room and not participate in the decision. They will decide whether I should be disqualified. I have made a decision not to disqualify myself. . . . I just looked at what I had done and decided that nothing I have done would make me inappropriate to sit on this. . . . With all due respect to Judge Broadman and his lawyers, I just don't see it. But I am not the last word on this . . .

The danger in the vagueness of the canon (or at least in its practical application) is that discipline under canon 3A(6) can be imposed not because the speech harmed the efficiency of the governmental employer, but because the speech or connected judicial ruling or the speaker was merely unpopular.[32] The West Virginia Supreme Court stated:

> We must jealously guard, however, against the use of judicial disciplinary proceedings based upon a

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32. *See* Gross, *supra*, at 1187-118.

> judge's purported language as a pretext for politically motivated attacks upon his or her character or integrity.[33]

This petition should be granted so that any questions about the scope of canon 3A(6) can be clarified, or so that it can be struck down as impermissibly vague. Undisputedly, the Commission did not like Judge Broadman's *legal rulings or ideas* or his attitude toward the disciplinary proceedings. They referred to one of his judicial acts as "no doubt . . . viewed by some as inhumane or by others as bizarre." App. 95a. They compared his attitude about the proceedings to that of another judge who had "made wild unsubstantiated claims of conspiracy and revenge," and "blame[d] the world for his troubles [and] refuse[d] to see his own shortcomings." App. 98a. Though the Commission recommended discipline on more than one ground, improper speech was a significant reason given for the sanction imposed.

Judge Broadman acknowledges that many do not approve of the content of his speech on or off the bench. *Time* once called him one of the most controversial judges in the nation. Members of this Court may wince at what he attempted in *Johnson* and *Zaring*. Yet, his unpopularity and this incident of discipline for improper speech highlight the constitutional defects of a speech prohibition so vague through enforcement that a judge only realizes his or her error after the Commission's letter of investigation is received.

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33. *In re Pauley*, 314 S.E. 2d 391, 398 (Wa. 1983).

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF CALIFORNIA FILED AUGUST 10, 1998

IN THE SUPREME COURT OF CALIFORNIA

S055684

HOWARD R. BROADMAN̄, a Judge of the Superior Court,

Petitioner,

v.

COMMISSION ON JUDICIAL PERFORMANCE,

Respondent.

THE COURT:

A judge may be disciplined for (1) willful misconduct in office, (2) persistent failure or inability to perform judicial duties, (3) habitual intemperance in the use of intoxicants or drugs, or (4) conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Cal. Const., art. VI, § 18, subd. (d) [former subd. (c)].) The discipline can be private or public admonishment, censure, or removal from office. (*Ibid.*)

Based on evidence presented at a public hearing before three special masters appointed by this court, the Commission on Judicial Performance (hereafter the Commission) determined that Judge Howard R. Broadman of the Tulare County Superior Court had engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute (hereafter prejudicial conduct). The Commission's recommended

discipline is public censure. Judge Broadman has petitioned this court to modify or reject the Commission's recommendation.

We conclude that Judge Broadman (hereafter petitioner) engaged in willful misconduct in office and in prejudicial conduct. We adopt the Commission's recommendation of public censure.

I. PROCEDURAL BACKGROUND

The Commission's third amended notice of formal proceedings, the operative pleading in this matter, charged petitioner with both willful misconduct in office and prejudicial conduct. It contained three counts. Count I alleged that petitioner abdicated his "duty to respect and comply with the law by taking judicial actions in knowing or reckless disregard of constitutional and other mandates." Count 2 charged that petitioner publicly commented on pending cases in violation of the Code of Judicial Conduct and used the news media as a forum to defend his judicial actions. Count 3 alleged that in matters involving Attorney Arthur Kralowec petitioner failed to conduct himself "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

On June 14, 1995, at the request of the Commission, this court appointed three special masters whom the Commission had selected from a list provided by this court. (Cal. Rules of Court, former rule 907.)[1] The special masters were Superior

1. Effective December 1, 1996, a number of the California Rules of Court relating to judicial discipline were repealed. Unless otherwise indicated, citations to the rules are to the version of the rules applicable at the time of the relevant events or proceedings.

Appendix A

Court Judges Spurgeon Avakian (retired) and Jay Pfotenhauer (retired), and Municipal Court Judge Jane York. After 27 days of evidentiary hearings, Special Masters Avakian and Pfotenhauer filed a majority report with the Commission, while Special Master York filed a concurring and dissenting report. As to the charges relevant here, Special Masters Avakian and Pfotenhauer concluded that petitioner had engaged in willful misconduct and prejudicial conduct by the manner in which he induced a criminal defendant and his counsel to waiving time for sentencing, in prejudicial conduct by publicly commenting on pending cases, and in willful misconduct and prejudicial conduct in matters involving Attorney Arthur Kralowec. Special Master York, on the other hand, concluded that petitioner's actions were prejudicial conduct as to all of the charges relevant here. The special masters made no recommendation as to the appropriate discipline.

The Commission, after hearing oral argument, determined that the record established by clear and convincing evidence that petitioner had engaged in prejudicial conduct by: (1) inducing a criminal defendant and his counsel into waiving time for sentencing without disclosing the purpose, (2) publicly commenting on two pending cases, and (3) attempting to influence the outcome of a civil action against Attorney Arthur Kralowec while it was pending before another superior court judge. The Commission recommends public censure.

II. THRESHOLD ISSUES

Petitioner raises several issues concerning the scope of this court's authority to review the Commission's recommendations, the standard of proof the Commission must satisfy to sustain its charges, and, together with his amicus curiae, the California

Judges Association (hereafter the CJA), the perceived ambiguity in this court's definition of willful misconduct in office. We address these threshold questions before discussing the facts underlying the charges and the issues related to them.

A. This Court's Authority

Petitioner argues that the state Constitution limits the scope of this court's role in reviewing Commission recommendations in two related respects. First, he asserts that when the Commission finds that a judge committed an improper act, and that the act was prejudicial conduct but not willful misconduct, our task is simply to determine whether the judge committed the act in question and whether the act amounted to prejudicial conduct. We may not, he claims, find that the act constituted willful misconduct. Second, he contends that when the Commission has recommended that this court impose a particular type of discipline, in this case public censure, we may either adopt the recommendation or we may absolve the judge, but we may not impose a discipline more severe than that recommended. We reject both contentions.

Former subdivision (c) of article VI, section 18, of the California Constitution provided that on "recommendation of the Commission," this court has jurisdiction to "censure or remove a judge for action . . . that constitutes willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (As amended Nov. 9, 1988.)[2] Because our power to discipline

2. Article VI, section 18, of the California Constitution governs the disciplining of judges. On November 8, 1994, the voters approved Proposition 190, which significantly changed the procedure for this (Cont'd)

a judge is contingent on a recommendation of the Commission, we may not impose judicial discipline on our own initiative (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5), and we may consider only those charges of willful misconduct or prejudicial conduct that the Commission sustained (*ibid.; Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168). Our review of the record is independent, however. We make findings of fact; we decide as a question of law whether the conduct warrants sanctioning the judge; and we make the ultimate decision whether to dismiss the proceeding or to admonish, censure, or remove the judge. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276.) Accordingly, this court can conclude that a judge engaged in willful misconduct, even if the Commission found that the judge's actions were not willful misconduct, but prejudicial conduct. (See, e.g., *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 195-196; *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535.) As we have observed in the past, "the ultimate disposition rests with this court." (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1317-1318, citing *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at pp. 799-800 & fn. 18.) Therefore, this court can, after an independent review, increase or decrease the discipline that the Commission has recommended. (See *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d at p. 276.)

(Cont'd)

court's review of Commission decisions but not the grounds for judicial discipline. Because the facts here occurred before the March 1, 1995, effective date of the amendments, we apply the former version of article VI, section 18. (*Dodds* v. *Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168, fn. 1.)

Appendix A

B. Standard of Proof

In judicial discipline proceedings, this court reviews the record and determines whether there is "clear and convincing evidence" to sustain the charges to a reasonable certainty. (See, e.g., *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168; *Ryan* v. *Commission on Judicial Performance, supra,* 45 Cal.3d at p. 530.) In *In re Angelia P.* (1981) 28 Cal.3d 908, 919, we described "clear and convincing" evidence as " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " Petitioner quotes that statement to support his assertion that if the "evidence is consistent with a hypothesis urged by the judge, this court is bound to accept that hypothesis."

Petitioner in essence equates the "clear and convincing" evidentiary standard with proof beyond a reasonable doubt. Thus, he argues, any reasonable doubt must be resolved in his favor, and any fact favorable to his interests is established if it is reasonably supported by the evidence. Petitioner is wrong. Evidence of a charge is clear and convincing so long as there is a "high probability" that the charge is true. (See, e.g., *In re Angelia P., supra,* 28 Cal.3d at p. 919; BAJI No. 2.62 (8th ed. 1994); 1 Witkin, Cal. Evidence (3d ed. 1986) § 160, p. 137.) The evidence need not establish the fact beyond a reasonable doubt.

Equally meritless is petitioner's contention that less-than-unanimous decisions by the 11-member Commission are "inherently suspect." We give "special weight" to the factual determinations of the special masters because they had the advantage of observing the demeanor of the witnesses. (*Dodds*

v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168.) Similarly, because of the Commission's expertise in evaluating judicial misconduct, we give "great weight" to its conclusions of law. (See *ibid.*; *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314.) We are "particularly deferential" to the Commission when it speaks with one voice, that is, unanimously. (*Dodds* v. *Commission on Judicial Performance, supra,* at p. 168.) Lack of unanimity, however, does not render the Commission's conclusions "inherently suspect," as petitioner claims. Although we will carefully consider any diverse views expressed by the Commission, the ultimate decision we will have to make is whether there is clear and convincing evidence to sustain the charges.

C. Willful Misconduct and Prejudicial Conduct

1. *Willful Misconduct*

To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. (See, e.g., *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172; *Doan* v. *Commission on Judicial Performance* (1995) 11 Cal.4th 294, 311.) Both petitioner and the CJA urge us to clarify the second of these elements. In past decisions, they note, this court has stated that judges act in bad faith when they engage in conduct they "should have known" to be beyond their lawful judicial powers. Petitioner and the CJA argue that this definition of bad faith threatens judicial independence because it allows judges to be disciplined for honest mistakes, and because the power to discipline for such

mistakes may be used against judges whose decisions have generated public controversy.

This court has said that bad faith, as an element of willful misconduct in office, means "that the judge 'intentionally committed acts which he knew *or should have known* were beyond his lawful power' [citation] or 'acts within the lawful power of a judge which nevertheless [were] committed . . . for any purpose other than the faithful discharge of judicial duties' [citations]." (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172, original bracket and ellipsis, italics added.) Although in other contexts this court has equated the phrase "should have known" with a negligence standard (see, e.g., *Carlin* v. *Superior Court* (1996) 13 Cal.4th 1104, 1112, fn. 2), it does not have this meaning when used to define the bad faith element of willful misconduct in office. Indeed, we have *rejected* the argument that a judge's intentional commission of an act that the judge "should have known" was beyond the judge's lawful authority "is sufficient in and of itself" to demonstrate the bad faith required for willful misconduct in office. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 46, fn. 7.) And we have said that "negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' " (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at p. 796.)

In the context of defining willful misconduct in office, we have equated bad faith with "actual malice," and we have contrasted it with a conscientious purpose to faithfully discharge judicial duties. (See, e.g., *Doan* v. *Commission on Judicial Performance, supra,* 13 Cal.4th at p. 311; *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359,

365; *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at p. 796.) Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith. Accordingly, our references in past decisions to bad faith as including judicial acts that a judge "should have known" to be beyond the judge's lawful judicial power are properly understood as referring to the state of mind in which a judge lacks actual knowledge of the limits on his or her judicial authority, is fully aware of this lack of knowledge, and fails or refuses to take reasonably available steps or to make a good faith effort to determine the extent of his or her judicial authority before undertaking to exercise it.

To summarize, we agree with petitioner and the CJA that mere negligence cannot satisfy the bad faith element of willful misconduct in office by a judge and that the phrase "should have known," because of its association in other contexts with a negligence standard, is potentially misleading and should be avoided. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

Appendix A

2. *Prejudicial Conduct*

Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is "*either* 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office' [citation] *or* 'willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity' [citation]." (*Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th at p. 312, original italics.) In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring "the judicial office into disrepute," that is, the conduct would appear to an objective observer to be prejudicial to " 'public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

III. REVIEW OF COMMISSION FINDINGS AND CONCLUSIONS

We now address the issues relating to the facts in this case.

A. Acts in Excess of Judicial Power

The Commission agreed with the finding by a majority of the special masters that petitioner used deception in procuring

a waiver of time for sentencing from criminal defendant Levert Hooks. Petitioner contends there is no clear and convincing evidence to support this finding. We disagree.

1. *Facts*

Defendant Hooks, who had tested positively for human immunodeficiency virus (HIV), was convicted of five counts of raping a fifteen-year-old girl. On Thursday, January 5, 1995, when Hooks and his attorney, Charles Rothbaum, appeared before petitioner for sentencing, petitioner announced at the outset: "This is the case of People versus Levert Hooks. I would like a time waiver on this case because I would like to present some questions to you folks before we impose sentence in this case for you to think about and to do some research on."[3] When petitioner responded "yes" to Attorney Rothbaum's inquiry whether the court wanted to set the sentencing hearing for a later date, Rothbaum said, "That's fine." The prosecution likewise agreed. Petitioner continued the sentencing hearing to March 7, 1995. The following colloquy between defense counsel and petitioner then took place:

"MR. ROTHBAUM: Can I inquire as to what you plan on doing between now and then in this case? It's a long delay. We don't mind. I'm just wondering what you're up to.

"THE COURT: I'm going to be asking you some questions to do some research on.

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3. Because a criminal defendant has a statutory right to be sentenced within 20 judicial days of the verdict of guilty (Pen. Code, § 1191), the imposition of sentence beyond that period requires the defendant's waiver of the time for sentencing.

"MR. ROTHBAUM: Three months worth of research?

"THE COURT: Well, isn't that two months?

"MR. ROTHBAUM: Two months. Well, all right, two months worth of research.

"THE COURT: *Trust me.*

"MR. ROTHBAUM: All right. That's fine.

"THE COURT: Is that okay with you, Mr. Hooks?

"THE DEFENDANT: Yeah." (Italics added.)

Petitioner then mentioned that he had heard over the radio that it cost the state $100,000 a year to provide medical treatment for an incarcerated HIV-positive inmate. After noting the probation report's recommended sentence of 40 years in prison, petitioner explained what he had in mind: "What I have thought of is a potential order that once the conviction is final that the government doctors shall not be required to provide prophylactic medicine or medicine to treat the incurable disease, but rather shall be required to provide him with food, hydration, and pain medication."[4]

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4. While this proceeding was pending before this court, the United States Supreme Court held, in *Bragdon* v. *Abbott* (June 25, 1998) __ U.S. __ [1998 WL 332958], that HIV is a disability within the meaning of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) even when the infection has not progressed to the symptomatic stage. The high court also held the ADA applies to inmates in state prisons (*Pennsylvania Department of Corrections* v. *Yeskey* (June 15, 1998) __ U.S. __ [66 U.S. L. Week 4481]).

Defense counsel Rothbaum immediately moved to withdraw his client's waiver of the time for sentencing. When petitioner denied the motion, defense counsel stated: "[W]hat you've basically done today is to extract from Mr. Hooks, without him knowing it, a waiver of time in order for you to be able to divest him, if you can, of what he at the present time is entitled to, which is medical care while he is in custody of the California Correctional System. [¶] There is no way that he is going to assist the court in divesting him of medical treatment if, in fact, he needs it and he's entitled to it. That's what you are asking us to do. [¶] You're asking him to let you have two months to see if you can screw him basically. That's not right. That's not right. And I didn't understand it. [¶] I certainly had no understanding of what was going on here when you made the request for the time waiver because you didn't tell me what it was about. And I certainly can't join in the entry of a waiver once I know the reason for it. [¶] It wasn't a knowing — it wasn't a knowing waiver."

Petitioner responded: "He may not have known why, but he knew he was waiving time."

Later that day, after the hearing had been concluded, petitioner asked his clerk to notify both the prosecution and the defense attorney that the Hooks case had been placed on the court's calendar for the following Monday, January 9, at 8:30 a.m.

On Friday, January 6, the day after the sentencing hearing involving the waiver, a local newspaper, the Visalia Times-Delta, reported the statements petitioner had made at the hearing regarding his concern about the high cost of providing medical care to HIV-positive inmates. The article

also mentioned the prosecution's view that the matter should be left to the correctional system. And it quoted defense attorney Rothbaum, who described petitioner's proposal to order the prison to withhold medical treatment from defendant Hooks as cruel and unusual punishment, and a "barbaric" attempt to impose a death sentence.

At the Monday, January 9, 1995, hearing, petitioner told the parties that he had placed the Hooks matter back on the court's calendar to clarify that his concern was with the allocation of resources within the prison system, not with HIV. He added: "A review of the transcript indicates that I misspoke. I told Mr. Rothbaum to trust me. And what I meant to say was, 'Mr. Rothbaum, trust me, you'll need all this time for the research.' And I didn't indicate that, and I think that that may have been misleading to Mr. Rothbaum." Rothbaum responded that he was misled by petitioner's failure to disclose his real purpose for requesting a time waiver, not by the "trust me" remark. Petitioner sentenced Hooks to a total of 50 years in prison on the 5 counts of rape. The sentence made no mention of medical treatment.

2. *Commission's Findings and Conclusions*

The Commission, by a vote of 9 to 2, found that petitioner's conduct in obtaining the time waiver in the Hooks case was improper. Although the Commission observed that petitioner's conduct "could plainly be willful misconduct," it nevertheless found petitioner's actions to be prejudicial conduct rather than willful misconduct because petitioner had, by putting the matter back on the court's calendar, acted promptly to correct his actions. The two dissenting commissioners voted to dismiss the charge.

Appendix A

3. *Our Review of the Commission's Decision*

After an independent review of the record (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168), we conclude there is clear and convincing evidence that petitioner engaged in willful misconduct in office in obtaining the waiver of the time for sentencing in People v. Hooks.

As we noted before, a judge engages in willful misconduct when, while acting in a judicial capacity, the judge acts in a manner that is unjudicial and in bad faith (that is, for a purpose other than the faithful discharge of judicial duties, or with knowledge that the act is beyond the judicial power, or with a conscious disregard for the limits of the judge's authority). As described in detail earlier, petitioner began the sentencing hearing by asking defense counsel and defendant Hooks to waive time for sentencing because he had "some questions" that he wanted the attorneys for both parties to research. When neither attorney indicated a problem in continuing the sentencing hearing to some future date, petitioner set the hearing for March 7, 1995. At that point, defense counsel expressed concern about the two-month delay: "Can I inquire as to what you plan on doing between now and then in this case? It is a long delay. We don't mind. I'm just wondering what you're up to." Petitioner reiterated his desire to have the attorneys do research on "some questions." When defense counsel inquired as to the need for "two months of research," petitioner replied: "Trust me."

Only after obtaining a time waiver from both defense counsel and defendant Hooks did petitioner disclose that he wanted the attorneys to research whether he could order prison

authorities to withhold from an HIV-positive inmate, such as defendant Hooks, any medical treatment for that condition. Defense counsel then strenuously objected, stating that his client was entitled to medical treatment, adding: "That's not right. That's not right. And I didn't understand it. [¶] I certainly had no understanding of what was going on here when you made the request for the time waiver because you didn't tell me what it was about. And I certainly can't join in the entry of a waiver once I know the reason for it. [¶] It wasn't a knowing — it wasn't a knowing waiver."

As this exchange demonstrates, petitioner did not reveal the real reason for his request for a time waiver until he, after asking defense counsel to "trust" him, received a time waiver from defendant and his counsel.

According to petitioner and his amicus curiae, the CJA, petitioner's "trust me" response referred to the substantial time (two months) that the attorneys would need to research the issue of withholding medical treatment from defendant Hooks during his incarceration in prison, and it had no bearing on the waiver issue. Even if we were to agree with this interpretation of the record, it is clear from defense counsel's vigorous disagreement with the continuance immediately after petitioner revealed the real reason for the continuance that petitioner had indeed "tricked" counsel into agreeing to the continuance. As the Commission in this case pointed out: "Judges have a special responsibility to deal honestly and forthrightly with all who appear before them, and when a judge displays a lack of integrity, as did [petitioner] in *Hooks*, confidence in the entire judiciary is weakened." A judge's attempt to "take [an attorney] unawares" by concealing material information, as petitioner did here, is "an abuse of the judicial process" constituting willful

misconduct. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 631.)

B. Public Comment on Pending Cases

At the time relevant here, canon 3A(6) of the former California Code of Judicial Conduct prohibited judges from making "public comment about a pending or impending proceeding in any court . . . ."[5]

Count 2 charged petitioner with violating former canon 3A(6) by publicly commenting on two criminal cases that were pending either in his court or in the Court of Appeal, *People* v. *Zaring* and *People* v. *Johnson*, and by continuing to do so after the Commission had advised him of the impropriety of his conduct. A discussion of the pertinent facts in these two cases follows.

1. *People v. Zaring*

Defendant Linda Zaring pleaded guilty to possessing and being under the influence of a controlled substance. Petitioner placed her on probation for five years on the condition, among others, that she "not get pregnant" during this period. Petitioner told Zaring: "You're thirty years old. None of your children are in your custody or control. Two of them on AFDC. And I'm afraid that if you get pregnant we're going to get a cocaine

5. The California Code of Judicial Conduct was replaced by the California Code of Judicial Ethics, effective January 15, 1996. The substance of former canon 3A(6) now appears in canon 3B(9) of the 1996 California Code of Judicial Ethics. Canon 3B(9), like former canon 3A(6), prohibits judges from making "public comment about a pending or impending proceeding in any court . . . ."

or heroin addicted baby." At a later proceeding, when Zaring was 22 minutes late for a court appearance, petitioner immediately revoked her probation and remanded her to the custody of the sheriff. On appeal, the court affirmed the conviction but held that the "no pregnancy" probation condition was overbroad, and thus invalid, because it impinged upon the exercise of the fundamental right to privacy. As to petitioner's order revoking probation, the Court of Appeal found that to be an abuse of discretion. (*People* v. *Zaring* (1992) 8 Cal.App.4th 362, 370-373, 379.)

2. *People v. Johnson*

Defendant Darlene Johnson pleaded guilty to three felony counts of corporal injury to two of her children. Petitioner granted probation to Johnson, who was then seven months' pregnant, and, after Johnson told him that she did not want to get pregnant again, imposed a probation condition that she be implanted with "Norplant," a birth control device then newly approved by the federal Food and Drug Administration. At a later hearing, petitioner denied Johnson's request to delete the Norplant birth control condition. But he granted Johnson's motion to stay imposition of that condition pending appeal, and he disqualified himself from further proceedings in the case. Following revocation of Johnson's probation by another judge, the Court of Appeal dismissed Johnson's appeal as moot.

On March 18, 1991, the Commission notified petitioner in writing that it had ordered a preliminary investigation to determine whether he had violated former canon 3A(6) of the California Code of Judicial Conduct by publicly commenting on the *Johnson* case, first while it was pending in his court and later while it was on appeal. The letter went on to state that

when the Norplant probation condition attracted national media attention, petitioner publicly explained his reasons for imposing the condition. The Commission noted that petitioner's public comments *before* the date of the hearing at which he considered defendant Johnson's motion to reconsider the Norplant probation condition created the appearance that he had prejudged the motion, and that his comments *after* that date gave the appearance that he was trying to influence the decision on appeal, thereby undermining public confidence in the judiciary's objectivity and impartiality.

Also in March 1991, apparently before the Commission's letter to petitioner just described, petitioner gave an interview to West Magazine explaining his reasons for the probation conditions in both the *Zaring* and *Johnson* cases. An article reporting this interview was published on July 9, 1991.

On April 4, 1991, petitioner responded in writing to the Commission's letter of March 18 pertaining to the Norplant condition in the *Johnson* case. He said that since becoming a judge he had been fully aware of former canon 3A(6)'s prohibition against publicly commenting on pending cases. He admitted giving interviews to several newspapers and television shows regarding the *Johnson* case, but stated that he had not sought media attention and had declined to appear on a number of television shows. Through his comments, he said, he had sought to explain both the Norplant probation condition and court procedures; and, when first interviewed, he did not know that defendant Johnson would file a motion to have him reconsider the Norplant condition.

On May 16, 1991, the Commission notified petitioner by letter that it had rejected his claim that his comments were

confined to procedural matters, concluding that he had violated former canon 3A(6). The Commission found petitioner's comments to detract from the appearance of judicial impartiality, and it directed his attention to former canon 2, which prohibited judicial conduct creating the appearance of impropriety. Nevertheless, while expressing "strong reservations," the letter informed petitioner that "the facts do not constitute grounds for proceeding further and [the Commission] determined to close its preliminary investigation of your statements to the media and issue this advisory letter."

In November 1991, petitioner gave an interview to Time magazine at his home. He again publicly commented on the *Johnson* case and defended himself against criticism of the Norplant probation condition. The article reporting this interview was published on March 9, 1992.

3. *Commission's Findings and Conclusions*

The Commission found as follows: When, in interviews he gave to West Magazine and Time, petitioner publicly commented on the "no pregnancy" probation conditions in the *Johnson* and *Zaring* cases, those cases were pending on appeal. Petitioner knew of former canon 3A(6)'s prohibition against publicly commenting on pending cases. He gave an interview to Time magazine and commented on the then-pending *Johnson* case *after* the Commission's letter to him stating that public comment on pending cases was improper. Petitioner conceded to the special masters that his public comments to Time and West Magazine violated the canon in question.

The Commission unanimously concluded that petitioner's actions constituted prejudicial conduct. It dismissed the charges

concerning petitioner's public comments in interviews given to other publications "in view of the Commission's findings of conduct prejudicial as to [the West Magazine and Time interviews], and in view of the potential for overlapping sanctions . . . ."

4. *Our Review of the Commission's Decision*

Petitioner concedes that he violated former canon 3A(6) when he publicly commented on the "no pregnancy" probation conditions he had imposed in the *Johnson* and *Zaring* cases. He insists, however, that no discipline can be imposed because as a judge he has a right under the First Amendment to the federal Constitution to make public comments on pending cases unless those comments pose a "substantial likelihood of material prejudice" to a fair trial. In support he cites the United States Supreme Court's decision in *Gentile* v. *State Bar of Nevada* (1991) 501 U.S. 1030, upholding a Nevada Supreme Court rule prohibiting lawyers from making public comments on pending cases that would pose a "substantial likelihood of materially prejudicing" a legal proceeding. We are not persuaded that the same standard applies to judges.

When a regulation implicates First Amendment rights, the constitutional validity of the restriction is determined by balancing the First Amendment interest against the state's legitimate interest in regulating the activity in issue. (See, e.g., *Gentile* v. *State Bar of Nevada, supra,* 501 U.S. at p. 1075; *Seattle Times Co.* v. *Rhinehart* (1984) 467 U.S. 20, 32.) Lawyers' "extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." (*Gentile* v. *State Bar of Nevada, supra,* at p. 1074.) For this reason, regulation of

public commentary by lawyers in pending cases serves the state's interest in ensuring fair trials. (*Id.* at p. 1075.) The state has a greater interest, however, in regulating the public commentary by a *judge* during the pendency of a proceeding, as explained below.

Because judges and attorneys play different roles in the judicial process, their public comments on pending judicial proceedings threaten the fairness of those proceedings in different ways and to different degrees. The public understands that in judicial proceedings lawyers, although also officers of the court, are advocates for the interests of their clients (see, e.g., *Gentile* v. *State Bar of Nevada, supra,* 501 U.S. at p. 1051 [professional mission of criminal defense bar is to challenge actions of the State]); therefore, the public does not expect a high degree of neutrality or objectivity when lawyers comment on pending cases, nor does the public expect all attorneys to assess the merits of pending cases in the same way. Judges, by contrast, cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law (see Preamble, Cal. Code Jud. Ethics) who apply the law uniformly and consistently. Because judges are both "highly visible member[s] of government" (*ibid.*) and neutral decisionmakers in all court proceedings, their public comments will be received by the public as more authoritative than those of lawyers. And because judges have this greater influence over public opinion, inappropriate public comment by judges poses a much greater threat to the fairness of judicial proceedings than improper public comment by lawyers.

A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary whether or not the case to which the comment is directed is

pending before the commenting judge. When the case is pending before the commenting judge, the public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties. (Rothman, Cal. Judicial Conduct Handbook (1990) § 160.550, p. I-39.) When the case is pending before a judge other than the commenting judge, the public may perceive the comment as an attempt to influence the judge who is charged with deciding the case. (*Ibid.*) Such comments may also create the public impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties.

The United States Supreme Court has not yet considered what limits the First Amendment to the federal Constitution imposes on a state's authority to restrict judges from publicly commenting on pending cases. The court has, however, addressed First Amendment limitations on a state's authority generally to regulate public speech by public employees. In *Pickering* v. *Board of Education* (1968) 391 U.S. 563 (*Pickering*), the high court held that the validity of a regulation limiting public employee speech is to be determined by balancing the interests of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Id.* at p. 568.) Because the state's interests in protecting the integrity of the judiciary and in maintaining public confidence in the judiciary are at least as strong as its interest in promoting the efficiency of public services generally, we conclude that the First Amendment protection for public comment on pending cases by judges is no more protective of judges, who are also public employees, than the standard articulated by the United

States Supreme Court for evaluating the regulation of public employee speech generally. (Accord, *In re Schenck* (1994) 318 Or. 402, 433 [870 P.2d 185, 204], cert. den. __ U.S. __ [115 S.Ct. 195] [adopting the *Pickering* standard for judicial comment on pending cases]; see Gross, *Judicial Speech: Discipline and the First Amendment* (1986) 36 Syracuse L.Rev. 1181, 1184-1190; see generally, Annot., First Amendment Protection for Judges or Government Attorneys Subjected to Discharge, Transfer, or Discipline Because of Speech (1992) 108 A.L.R.Fed. 117, 126-127.) And we reject petitioner's proposed standard permitting judges to comment publicly on any pending case unless the particular comment poses a "substantial likelihood of material prejudice," for it affords insufficient protection to the state's interest in both the fact and the appearance of judicial impartiality and integrity.

To better understand how the *Pickering* test works, we consider those decisions in which the United States Supreme Court has applied it. In *Pickering, supra,* 391 U.S. 563, a board of education had dismissed a high school teacher for publicly criticizing the board's allocation of school funds between athletics and education and the board's method of informing the public regarding the need for additional revenue. To determine whether this restriction on a public employee's speech was permissible under the First Amendment, the United States Supreme Court balanced the teacher's interest in commenting upon these matters of public concern against the school district's interest in promoting the efficiency of public schools. (391 U.S. at p. 568.) The court concluded that the school board had violated the First Amendment because the teacher's interest outweighed the district's interest. (391 U.S. at pp. 571-573.) The court has since used this same analysis in other cases involving restrictions on public employee speech.

(See, e.g., *Perry* v. *Sindermann* (1972) 408 U.S. 593 [refusal to rehire teacher who had testified before state legislature]; *Mt. Healthy City Board of Ed.* v. *Doyle* (1977) 429 U.S. 274 [refusal to rehire teacher for relaying substance of teacher dress and appearance memorandum to radio station]; *Givnan* v. *Western Line Consolidated School District* (1979) 439 U.S. 410 [termination of teacher based on private communications alleging racially discriminatory policies of school district].) In *Connick* v. *Myers* (1983) 461 U.S. 138, 146, the high court held that the First Amendment protection for public employee speech on a subject of no public concern is less than for speech addressed to matters of significant public interest.

The United States Supreme Court has applied this balancing test not only to determine the validity of the discipline imposed on particular public employees for particular public speech, but also to determine the facial validity of broadly worded speech regulations similar to former canon 3A(6). For example, the court used the *Pickering* balancing test to strike down a statute that prohibited federal employees from accepting compensation for giving speeches or writing articles regardless of whether the subject of the speech or the article, or the sponsoring group, had any connection to the employee's official duties. (*United States* v. *Treasury Employees* (1995) 513 U.S. 454, 466-467.) In another case, the high court applied the *Pickering* test to uphold, as constitutional on its face, a federal statute prohibiting federal employees from taking an active part in political management or in political campaigns. (*CSC* v. *Letter Carriers* (1973) 413 U.S. 548, 564; see *United States* v. *Treasury Employees, supra,* at p. 467, reaffirming *Public Workers* v. *Mitchell* (1947) 330 U.S. 75.) Accordingly, the *Pickering* balancing test may properly be used to determine

the facial validity, against a First Amendment challenge, of regulations such as former canon 3A(6).

Generally speaking, court proceedings are matters of public concern and, again generally speaking, judges have as great an interest as other individuals in commenting publicly on these proceedings. Under the *Pickering* test described above, we determine the validity of former canon 3A(6) under the First Amendment by balancing this general interest of judges in making public comments on court proceedings against the state's interest in the soundness of the judicial system. In doing so, we note that former canon 3A(6)'s restrictions on public comment by judges are narrowly drawn to apply only to proceedings that are pending or impending, not those that have become final, and that the former canon "does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court" (Cal. Code Jud. Conduct, former canon 3A(6)).

As we have explained, there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient. As we have also explained, former canon 3A(6) effectively promotes this interest because public comments by judges on matters pending before them may give the appearance that the judge has prejudged the merits of the controversy, has become an advocate for the interests of one of the parties, or has resorted to extrajudicial means to defend the judge's own rulings. As applied to comments on matters pending before another judge, the former canon prevents a judge from exerting, or appearing to exert, pressure on another judge to decide a matter a particular way. Accordingly, we conclude that the burden that former

canon 3A(6) imposes on the general interest of judges in making public comments on court proceedings is outweighed by the benefits it achieves in furthering the state's interest in the soundness of the judicial system; therefore, former canon 3A(6) is not invalid under the First Amendment as an impermissible restriction on public speech.[6]

We also reject as meritless petitioner's assertion that former canon 3A(6) is void for vagueness. A rule is not void for vagueness if it provides " ' "fair notice to those to whom [it] is directed." ' " (*Gentile* v. *State Bar of Nevada, supra,* 501 U.S. at p. 1048, original brackets.) We find unconvincing petitioner's assertion that he had "difficulties in determining if public comment was prohibited" in a case, such as *People* v. *Johnson*, in which he had recused himself from any further participation while the decision was pending on appeal. The former canon clearly included matters pending on appeal. It expressly referred to a proceeding pending "in any court." We also find unpersuasive petitioner's claim that he was left to guess how "public" a public comment had to be to violate the former canon. A matter is public if it is open or available to all, that is, accessible to everybody. (Webster's New Internat. Dict. (2d ed. 1941) p. 2005, col 1.) The words "public comment" in the former canon gave petitioner fair notice that it referred to comments disseminated to the community.

Having decided that former canon 3A(6)'s prohibition against public comment on pending cases by judges is

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6. Although we reach this conclusion by applying the test that the high court articulated in *Pickering, supra,* 391 U.S. 563, the same conclusion would likely follow from application of the *Gentile* standard that petitioner urges us to adopt. (See, e.g., *In re Inquiry of Broadbelt* (1996) 146 N.J. 501, 519 [683 A.2d 543, 552] [applying *Gentile* standard upholding canon restricting judges' public comments on pending cases].)

permissible under the First Amendment to the federal Constitution, we now determine whether petitioner's acts constituted judicial misconduct.

A finding of *willful misconduct in office* requires that the misconduct occur while the judge is acting in a judicial capacity. A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose. (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172; see *Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 319.) Petitioner's public comments were made in the course of interviews with the press, not while he was acting in a judicial capacity. They therefore cannot constitute willful misconduct in office. As the Commission correctly concluded, however, petitioner's actions constituted *prejudicial conduct,* that is, " 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office . . . .' " (*Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th at p. 312.) Petitioner engaged in unjudicial conduct by violating a canon of judicial conduct, former canon 3(A)(6), with knowledge of its restrictions. By making public comments in an attempt to justify and defend his decisions while those decisions were pending on appeal, petitioner adopted the role of an advocate. Such actions would appear to an objective observer to be " 'prejudicial to public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

Appendix A

C. Abuse of the Judicial Office

The Commission's final charge was that petitioner failed, in matters involving Attorney Arthur Kralowec, to conduct himself "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

1. *Facts*

In 1983, *before* petitioner became a judge, he represented a party in a case in which Attorney Kralowec was the opposing counsel. The relationship between petitioner and Kralowec developed into one of intense antagonism.

In 1994, *after* petitioner became a judge, Attorney Kralowec represented one of petitioner's former clients, Darlene Woods, in Woods v. Broadman, a legal malpractice action against petitioner. While the case was pending, Kralowec himself was the defendant in another legal malpractice action, Metzger v. Kralowec. Attorney Thomas Anton represented plaintiff Metzger, who faulted Kralowec for not disqualifying petitioner from ruling in the underlying action on a motion for summary judgment and ordering arbitration of the matter. At the trial in Metzger v. Kralowec, which was tried before another judge of the Tulare Superior Court in 1995, petitioner's name was mentioned by participants in the trial 150 to 200 times.

At one point in the malpractice action against Kralowec, the court reporter told plaintiff Metzger's attorney, Thomas Anton, that petitioner would like to see him. When Anton made no effort to see petitioner, the court reporter again told Anton that petitioner wanted to see him, a communication that Anton at that point considered an order. Later, during the lunch break

in that day's proceedings in the Metzger case, Anton met with petitioner in petitioner's chambers.

At this meeting, petitioner offered to testify on behalf of Attorney Anton's client. When Anton expressed interest in learning when Attorney Kralowec started representing plaintiff Woods in the malpractice action against petitioner, the latter telephoned the court clerk's office, identified himself as "Judge Broadman," and requested that the file in *Woods* v. *Broadman* be made available to Anton. When the conversation turned to the subject of a State Bar investigation of Attorney Kralowec, petitioner telephoned the State Bar, identified himself as "Judge Broadman," and asked about the status of the investigation. Turning to Attorney Anton's representation of the plaintiff in the malpractice action against Kralowec, petitioner mentioned that in the past Kralowec had hidden his assets and it would be difficult to collect on a judgment against Kralowec. At a later point, when petitioner and Anton met in the court hallway, petitioner told Anton not to mention the meeting to anyone.

Thereafter, during the punitive damages portion of the trial in Metzger v. Kralowec, petitioner entered the courtroom and briefly sat in the audience while Attorney Kralowec was testifying. The jurors, some of whom knew petitioner was a judge, noted and discussed his visit. When a court employee asked petitioner why he had come to Kralowec's trial, petitioner replied that he was "just being an asshole."

2. *Commission's Findings and Conclusions*

The Commission, by a vote of six to five (five voting to dismiss), found petitioner's actions in the Kralowec matter to be *prejudicial conduct*. It agreed with the special masters that

petitioner's acts had been motivated by a desire "to harm his old adversary," Attorney Kralowec, and it determined that petitioner had acted more as a "vigilante" than as a judge. The Commission concluded that those actions were not willful misconduct because they occurred while petitioner was acting in a nonjudicial capacity.

3. *Our Review of the Commission's Decision*

We agree with the Commission's determination that petitioner's acts in Metzger v. Kralowec were not willful misconduct. As we discussed earlier, one of the elements of willful misconduct is that the judge must have acted in a judicial capacity. Here, neither petitioner's meeting in his chambers with Attorney Anton nor his brief appearance in the courtroom where the case of Metzger v. Kralowec was being tried were acts within his judicial capacity: Neither instance involved any adjudicative or administrative functions of petitioner's judicial office.

But, as the Commission determined, petitioner's acts did constitute prejudicial conduct, that is, conduct that would appear to an objective observer to be prejudicial to " 'public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

Through his actions, as described in detail at the beginning of this section, petitioner tried to affect the outcome in the legal malpractice case involving Attorney Kralowec, against whom he bore personal animosity. While the case was being tried before another judge, petitioner summoned Attorney Anton, who represented plaintiff Metzger, to his chambers. There, petitioner expressed his intense dislike of Kralowec and offered

assistance in strengthening the plaintiff's malpractice action against Kralowec. In petitioner's words, he hoped that Anton would "kick the son of a bitch's ass." He offered to testify against Kralowec, he telephoned for delivery of a court file in a different malpractice action, and he checked with the State Bar to find out the status of a complaint against Kralowec, all in an effort to assist Attorney Anton in the malpractice case against Kralowec. Later, during Kralowec's testimony, petitioner briefly attended the trial; the jurors, some of whom knew petitioner to be a judge, noted and discussed his visit. When a court employee asked why petitioner had come to Kralowec's trial, petitioner replied he was "just being an asshole." We agree with the Commission that taken together petitioner's actions, which were motivated by "a desire to bring about a result harmful to Kralowec because of personal animosity between them," would appear to an objective observer to be prejudicial to the public esteem for the judicial office.

We reject petitioner's contention that he had a duty, under this court's decision in *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th 163, to visit the courtroom in which Attorney Kralowec was testifying in Metzger v. Kralowec to take "active steps to prevent or discourage perjury." *Dodds* is distinguishable. Judge Dodds saw another judge letting the air out of the tires of a van belonging to a disabled person who had parked in the judge's parking space. We disciplined Judge Dodds for, among other things, failing to report the incident as required by former canon 3D and for initially refusing to give a statement to a detective investigating the matter. (*Id.* at pp. 170-171.) Here, petitioner came to the courtroom because, as he explained, he thought Kralowec might perjure himself. That was pure speculation on petitioner's part.

Dodds does not impose a duty on a judge to take action to prevent any speculative misconduct.

We also reject petitioner's argument that his actions in Metzger v. Kralowec are protected by the First and Fourteenth Amendments to the United States Constitution because he was acting as a private person in a private dispute. As petitioner notes, his position as a judge does not divest him of constitutional rights. (See *Pickering, supra,* 391 U.S. at p. 568.) But that does not mean that his rights are therefore the same as those of a private citizen. The state's interest in regulating conduct increases correspondingly with the authority and accountability of the public position at issue. (*Rankin* v. *McPherson* (1987) 483 U.S. 378, 390-391.) As a judge, petitioner's rights do not extend to protecting conduct that would appear to an objective observer to be prejudicial to the public esteem for the judiciary.

IV. DUE PROCESS

Petitioner contends he cannot be disciplined because the Commission's proceedings violated his right to due process under the Fourteenth Amendment to the federal Constitution.

Petitioner first complains about the Commission's role in this court's appointment of the special masters. Our order appointing the special masters in this matter states that "the following judges, selected by the commission from a list submitted by the Supreme Court, are hereby appointed Special Masters . . . ." Petitioner argues that this method of selecting the special masters violates due process because, under former rule 907 of the California Rules of Court, the Commission cannot have any role in the selection of special masters beyond

requesting this court to make the appointments. We disagree. Former rule 907 provided in relevant part: "In place of or in addition to a hearing before the Commission, the Commission may request the Supreme Court to appoint three special masters to hear and take evidence in the matter, and to report to the Commission." Although our order stated that the three special masters in this case were "selected by the commission," the list from which the Commission selected the special masters was provided by this court and the special masters were actually appointed by this court. Nothing in former rule 907 prohibits this court from considering, that is, accepting or rejecting, a recommendation of the Commission for the appointment of special masters whose names the Commission drew from a list provided by this court.

Petitioner next complains that the Commission's staff and examiners violated his due process rights because they did not start interviewing witnesses until almost two years after the first notice of formal proceedings in May 1993. This delay, petitioner argues, violated his right to due process because it impaired the ability of witness to remember events. Petitioner, however, has failed to demonstrate prejudice by the delay. He does not identify the testimony of any material witnesses whose memory was impaired by the passage of time. In addition, several of the charges against petitioner concerned matters the Commission could adequately investigate without questioning witnesses. For example, pertinent information on the charges pertaining to petitioner's actions in court could be obtained from court transcripts. Likewise, information on the charges relating to petitioner's public comment on pending cases could be found in publications containing petitioner's interviews. (See *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 837.)

Appendix A

Petitioner also accuses the Commission of including unfounded and inflammatory allegations in the third amended notice of formal proceedings, as a result of which, petitioner asserts, he "suffered an injustice." Count 2 alleged that in an interview petitioner gave to West Magazine he "quoted defendant Linda Zaring (who is African-American) while 'mimicking a black accent.' " On the first day of the hearing before the special masters, the Commission's counsel moved to strike this allegation after learning that Zaring was White. The special masters granted the motion. Because this error was corrected before any evidence was presented, petitioner suffered no prejudice.

Petitioner next argues that he had to defend against allegations not included in the pleadings, specifically allegations that he had through deception obtained defendant Johnson's consent to the Norplant condition of probation, and that he improperly resorted to the use of court personnel in Metzger v. Kralowec, a case not assigned to him. It is true that neither allegation appeared in the pleadings. Petitioner, however, has not shown that he was surprised, disadvantaged, or otherwise legally prejudiced by these allegations.

Petitioner further contends he suffered prejudice from a "delay" by the Commission in bringing the proceedings to a hearing. A claim of undue delay requires a showing of actual prejudice. (See *Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d at p. 837.) Petitioner has failed to make such a showing. As to petitioner's claim that he was disadvantaged by lapses in his memory in two instances, both pertain to counts that were dismissed; thus, petitioner suffered no prejudice.

Additionally, petitioner contends that at the hearing before the special masters, the Commission's attorneys "ambushed" him by not timely providing his counsel with notes of a discussion between one of the Commission's attorneys and witness Thomas Richey. Attorney Richey had witnessed an incident that led to a charge (later dismissed) that petitioner "showed a lack of judicial temperament and impartiality" by ordering Attorney Kralowec out of his courtroom. While discussing this matter with Commission examiner Dennis Coupe, Richey mentioned that a client of his wanted to file a complaint with the Commission about petitioner. Coupe sent notes of this conversation to his cocounsel in Los Angeles. Cocounsel, for unknown reasons, never received the notes. At the time Coupe made his notes and sent them to his coexaminer, he did not consider the information about the incident described by Richey discoverable. As Coupe stated in his declaration: "The new incident was not relevant to any pending charge, and I did not see how any Richey testimony on it could come in as rebuttal to any existing charge." The notes were not provided to petitioner's counsel before the hearing.

The Commission's examiners decided to call Richey as a witness to the incident in which petitioner ordered Attorney Kralowec out of his courtroom. One day before he testified, Richey told Rene Sample, an associate of petitioner's counsel, that petitioner had "brutalized" one of his clients and suggested that petitioner's counsel not question him regarding any character issues. Sample told Richey not to worry because any unfavorable character evidence pertaining to petitioner would not be admissible. Sample's notes of the conversation included Richey's comment that 90 percent of petitioner's conduct was "a cut above that of other judges," but they did not mention the "brutalizing" incident involving Richey's client.

Appendix A

Before putting Richey on the witness stand, the examiners called Mary Rogers, a law partner of Richey's, as a witness to the incident in which petitioner had ordered Attorney Kralowec out of the courtroom. After Rogers's testimony, petitioner made her his own witness to present mitigation testimony. When Commission Attorney Coupe realized that petitioner might also call Richey, who had not yet testified, as his own witness to present mitigation testimony, Coupe gave Stephen Cornwell, petitioner's counsel, a copy of the notes of his conversation with Richey. After the examiners had concluded their questioning of Richey, petitioner's attorneys did indeed call Richey as a witness for petitioner for the purpose of presenting mitigation evidence. Richey testified that 90 percent of petitioner's conduct was "a cut above" that of other judges. On cross-examination, when one of the examiners asked Richey about the remaining 10 percent, Richey mentioned that petitioner had "brutalized" a client of his. Petitioner's counsel did not object to the cross-examination, but he later moved to strike the testimony. The special masters denied the motion on a two-to-one vote.

Although examiner Coupe did not make his notes pertaining to his conversation with Richey immediately available to petitioner's counsel, Coupe did provide them to petitioner's counsel before Richey testified as a mitigation witness for petitioner. After reviewing those notes, petitioner's counsel did not seek a continuance; in calling Richey as a mitigation witness petitioner's counsel was under the mistaken belief that the unfavorable character evidence would not be admissible on cross-examination. We agree with the special masters' finding that there was "nothing improper in the conduct of the Examiners, nor anything in this incident to suggest bias on their part." As the special masters explained. "If there is

any risk that the incident described by Richey might affect [petitioner] adversely, that risk was created by [petitioner's counsel's] decision to put Richey on as a character witness despite the concern he had expressed to [petitioner's] counsel that his direct examination might lead to the disclosure of the bad experience on cross-examination." Accordingly, we reject petitioner's contention that the Commission's attorneys "ambushed" him by not providing Coupe's notes of his conversation with Richey before the start of the hearing before the special masters.

Finally, petitioner argues that "the Commission's recommendation of public censure and its stated decision to 'limit' the value of mitigation evidence was an impermissible reaction to [his] vigorous legal defense in these proceedings." In support of his contention, petitioner cites the Commission's comment that he refused "to accept any responsibility for his conduct."[7] We reject petitioner's claim. Petitioner has not shown that the Commission penalized him for presenting a vigorous defense. Rather, the Commission's comment indicates that the Commission based its recommendation of public censure in part on petitioner's lack of remorse, as shown by his unwillingness to accept responsibility for clearly established misconduct such as "tricking" the defendant in People v. Hooks into waiving time for sentencing. (See *In re Lewallen* (1979) 23 Cal.3d 274, 281 [trial court may not increase sentence in

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7. Petitioner further asserts that the Commission's statement that he refuses to accept any responsibility for his conduct is factually inaccurate because he did admit violating former canon 3A(6), prohibiting public comment on pending cases. Although he admits violating the canon, he does so in the context of his contention that the canon has no force because it is unconstitutional, a claim we rejected in part III.B.4., *ante*.

criminal case because the defendant refused a plea bargain but may consider information that came to court's attention during or after trial].) Lack of remorse is a relevant consideration in judicial discipline (see, e.g., *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 377), in attorney discipline (see, e.g., *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 197), and in criminal sentencing (see, e.g., Cal. Rules of Court, rules 414(b)(7), 423(b)(3)).

V. DISCIPLINE

"In making our independent determination of the appropriate disciplinary sanction, we consider the purpose of a Commission disciplinary proceeding — which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

For the reasons given above, we conclude that in "tricking" defendant Hooks and his counsel into waiving time for sentencing, petitioner engaged in *willful misconduct in office*,[8] and that he engaged in *prejudicial conduct* when he attempted to influence the outcome of the civil action against Attorney Arthur Kralowec and when he publicly commented on the *Johnson* and *Zaring* cases while they were pending. We agree with the Commission that the appropriate discipline is public censure.

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8. As discussed earlier, the Commission found petitioner's actions in the Hooks case to be prejudicial conduct rather than willful misconduct.

Appendix A

Petitioner insists that public censure is inappropriate because there were "abundant mitigating factors" presented through the testimony of 20 witnesses who described petitioner as industrious and innovative. Although such evidence may be taken "into account in considering the totality of the circumstances" (*Adams* v. *Commission on Judicial Performance, supra,* 10 Cal.4th at p. 912), it does not mitigate or excuse willful or prejudicial conduct (*ibid.*). The Commission did consider the evidence in mitigation, but it concluded that the seriousness of petitioner's misconduct warranted public censure, especially in light of his "refusal to accept any responsibility for his conduct."

According to petitioner, public censure in his case is improper because his misconduct is less egregious than that of judges publicly censured in previous cases. Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. "Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar." (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d at p. 1318.)

In support of petitioner, the CJA argues against public censure because petitioner did not engage in repeated acts of misconduct. We disagree with the CJA that public censure is inappropriate in the absence of a pattern of repeated acts of misconduct. A level of discipline may be warranted either by the existence of a pattern of misconduct or by the seriousness of a single incident. (*Gubler* v. *Commission on Judicial Performance, supra,* 37 Cal.3d at p. 50 ["The fact that an act is an isolated incident does not preclude a determination of willful

misconduct."]; see *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d at p. 371.)

After careful consideration of the arguments by the Commission and by petitioner, we agree with the Commission's recommendation of public censure. In light of petitioner's lack of candor and integrity in obtaining the waiver in the Hooks case, his public comments on pending cases — in one instance *after* a written warning by the Commission that public comment on pending cases would violate former canon 3(A)(6) — and his attempt to influence the outcome of the civil proceeding against Attorney Arthur Kralowec, public censure is appropriate.

Accordingly, and by this order, Judge Broadman is publicly censured.

APPENDIX B — MODIFICATION OF OPINION OF THE CALIFORNIA SUPREME COURT FILED SEPTEMBER 2, 1998

HOWARD R. BROADMAN,
a Judge of the Superior Court,
Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE
Respondent.

No. S055684
California Supreme Court
Filed September 2, 1998

THE COURT:

MODIFICATION OF OPINION

The opinion herein, filed August 10, 1998, is modified by deleting the sentence beginning on page 29, line 5* that reads, "We disciplined Judge Dodds for, among other things, failing to report the incident as required by former canon 3D and for initially refusing to give a statement to a detective investigating the matter" and inserting in its place the sentence "We held that Judge Dodds engaged in prejudicial conduct by, among other things, failing to report the incident as required by former canon 3D and for initially refusing to give a statement to a detective investigating the matter."

This modification does not affect the judgment.

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* See Daily Appellate Report of August 11, 1998, page 8641, column 1, 4th sentence, first full paragraph.

APPENDIX C —DECISION AND RECOMMENDATION OF THE STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE DATED AUGUST 22, 1996

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON
JUDICIAL PERFORMANCE

Inquiry Concerning a Judge

No. 108 (Judge Howard R. Broadman)

Decision and Recommendation

This is a disciplinary matter concerning Howard R. Broadman, Judge of the Tulare County Superior Court. After formal fact finding and review by the Commission, the Commission has concluded that public censure is appropriate. It, therefore, submits the following findings and recommendation to the Supreme Court.

PROCEDURAL HISTORY

Formal proceedings in this matter were commenced with the service of the Commission's Notice of Formal Proceedings dated May 10, 1993. After a preliminary hearing was held on August 19, 1993,[1] further investigation letters and amendments to the original Notice continued up to the time that the formal

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1. This matter initially arose as a proposed Public Reproval which, under the Rules then applicable, Judge Broadman rejected. At his request, Judge Broadman met with the Commission on August 19, 1993, exhibit 41. The Commission then proceeded with its preliminary investigation.

hearing began in July 1995. Special Masters were appointed by the Supreme Court on June 14, 1995.[2]

Judge Broadman was represented in the formal proceedings by Stephen R. Cornwell and McCormick, Barstow, Sheppard, Wayte & Carruth of Fresno, California. Until July 1, 1994, the Examiner for the Commission was the California State Attorney General's office. By letter dated June 20, 1994, Judge Broadman objected to the Attorney General's participation, and the Commission thereupon withdrew the referral.[3] The Commission

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2. The Special Masters were Judge Spurgeon Avakian, Judge Jay Pfotenhauer and Judge Jane York. They were selected by the Commission from a list submitted by the Supreme Court to hear and take evidence in this matter and to report thereon to the Commission. (See Rule 907, Cal. Rules of Court. Order by Chief Justice Lucas, dated June 14, 1995.)

3. The Attorney General's office represented the People in connection with several criminal matters that had been appealed from Judge Broadman's Court. By letter dated June 20, 1994, Judge Broadman asserted that the Attorney General's office had acted as his attorney in the handling of the criminal appeals, asserted that there was an impermissible conflict of interest in the Attorney General's past representation of Judge Broadman and the prosecution of a disciplinary action against him, and demanded that the Attorney General withdrew from representing the Commission. The Commission withdrew the referral to the Attorney General's office and advised Judge Broadman of that action by letter dated July 1, 1994.

At a later date in the hearing, Judge Broadman announced that he was planning to call M. David Stirling Chief Deputy Attorney General, to testify as a witness and to ask him to relate information he had obtained in his capacity as the Commission's attorney. The Chair of the Commission, acting on behalf of the Commission, advised Mr. Stirling by letter dated August 22, 1995:

(Cont'd)

was thereafter represented by John Shepard Wiley, Jr., a professor of law at the University of California School of Law in Los Angeles, California, and by Dennis Coupe of the Commission's Office of Trial Counsel.

The California Judges Association (hereafter "CJA") participated before the Masters and the Commission as *amicus curiae* and was represented by Stephen R. Barnett, a professor of law at the University of California School of Law at Boalt Hall, in Berkeley, California.

PROPOSITION 190

This disciplinary action was commenced before passage of Proposition 190. As a pre-Proposition 190 case, the Commission's authority with respect to public discipline is limited to making findings and recommendations to the Supreme Court.

As a pre-Proposition 190 case, this Commission proceeding would ordinarily be confidential. Judge Broadman requested

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(Cont'd)

> The Commission expects that your office will abide by its obligation to assert the privilege on behalf of the Commission and that your office will abide by the strictures of confidentiality afforded to the Commission and its proceedings, as well as to the judges, witnesses, and others protected by confidentiality. (Letter dated August 22, 1995, Exhibit F, Exhibits to Respondent's Sealed Objections to Final Report of Special Masters (filed herein under seal).)

As discussed below, this action by the Chair was later cited by Judge Broadman as a ground to disqualify the Chair from further participation in this matter.

that the hearing in this matter be open to the public, and that request was granted by letter dated July 6, 1993.

SUMMARY OF ISSUES PRESENTED FOR DECISION

The May 10, 1993 Notice of Formal Proceedings was amended three times (May 13, 1994, June 8, 1995, and July 1, 1995) before the actual commencement of hearing and was amended orally during the opening statement. The operative pleading upon which this proceeding was heard was the Third Amended Notice of Formal Proceedings, with the last sentence of Count Two, subpart C having been stricken.[4] (Hearing

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4. This sentence was stricken by the Examiner on the first day of the hearing. In its original form, the Third Amended Notice alleged: "During that interview, the article stated, you quoted defendant Linda Zaring (who is African-American) while 'mimicking a black accent.' " Judge Broadman's Answer responded: "Respondent further denies that during the interview regarding said article that he quoted Linda Zaring while mimicking a black accent." (Answer, page 6, lines 1-3.) Thus the pleadings did not frame an issue as to whether Zaring was African-American or some other race. If race was a material issue, it was admitted by Judge Broadman's failure to deny the allegation of the Notice.

For reasons set forth below in connection with allegations that Commissioner Masterson should be disqualified, it should be noted also that this allegation was in earlier versions of the Notice. And again, the issue of race had not been disputed — it was included as an "admitted" fact.

At some time before the hearing began, the Examiner learned that Ms. Zaring was a Caucasian. Prior to the commencement of the hearing, the Examiner then moved to strike the erroneous allegation of the Notice, quoted above. (Hearing Tr. pp. 16-17). The Commission found no

(Cont'd)

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Transcript, pp. 17, 50, 1720 (hereinafter H.Tr.).) Judge Broadman filed verified Answers dated June 20, 1993, June 2, 1994, June 23, 1995 and July 5, 1995.

The Notice sets forth three separate counts, each of which contains subordinate counts. In summary, it was alleged in Count One that Judge Broadman either exceeded his lawful authority or disregarded the law in five instances and that such actions constituted a "gross abuse of legal power":

> Count 1A. In his sentencing of Darlene Johnson by requiring as a condition of probation that she be surgically implanted with the Norplant birth control device;
>
> Count 1B. In his sentencing of Linda Zaring by requiring as a condition of probation that she not become pregnant;
>
> Count 1C. By jailing Linda Zaring, revoking her probation, and reinstating a prison term of two years as a consequence of her arriving 22 minutes late for an appearance in Judge Broadman's court;
>
> Count 1D. By deceiving Levert Hooks, who was HIV-positive, into agreeing to a waiver of his

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(Cont'd)

evidence in the record that Judge Broadman had been aware of this error at any time prior to July 13, 1995 (when his trial brief stated, "Linda Zaring is Caucasian"), or that the Examiner, whether the Attorney General or later Mr. Wiley, had any reason to suspect that Ms. Zaring's race was, under the state of the pleadings, in dispute, or a matter requiring investigation.

constitutional right to a speedy trial, so that Judge Broadman could conduct research on whether life sustaining medications could be withheld from defendant Hooks while he was serving a 40 to 50-year sentence in prison; and

Count 1E. By conditioning the plaintiffs' right to a trial preference either upon the plaintiffs discharging their attorney, a long time adversary of Judge Broadman's, or alternatively, the payment of sanctions, which had been imposed upon the attorney personally in an earlier trial.

The second count alleges that Judge Broadman made public comments about pending cases in violation of then section 3A(6), now 3B(9), of the Code of Judicial Conduct, in three instances:

Count 2A. By making public comments about the *Johnson* (Norplant) case, while it was on appeal, in interviews with major television networks and newspapers, as set forth in a letter to Judge Broadman from the Commission dated March 18, 1991;

Count 2B. By making public comments about the *Johnson* (Norplant) case while it was on appeal, to Time Magazine, despite the previous letter from the Commission dated March 18, 1991 and an advisory letter dated May 16, 1991; and

Count 2C. By making public comments about the *Zaring* case while it was on appeal, to West Magazine, which was published in July, 1991.

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The third count of the Notice alleges abuse of the judicial office in two instances:

> Count 3A. By offering assistance and information to the plaintiff in the pending case of *Metzger v. Kralowec* in February/March 1995; and
>
> Count 3B. By ordering attorney Kralowec to leave his courtroom on August 22, 1994 when there was no justification for doing so.

In addition to the issues presented by the Notice, the Answer to the Notice raised the issue as to whether Judge Broadman was deprived of due process of law.

Immediately before oral argument, Judge Broadman filed a motion to disqualify the Chair of the Commission from further proceedings on the ground of bias. The grounds cited were that the Chairman had signed the Third Amended Notice of Formal Proceedings, which contained the erroneous allegation that Linda Zaring was an African American, and on the ground that the Chair had become a witness in the case through his letter to the Attorney General regarding attorney-client privilege. (See footnotes 3 and 4 above.) The Chair referred the motion to the Commission which, acting with the Chair recused, denied the motion by separate order.

Finally, by motion submitted at the time of oral argument before the Commission, Judge Broadman asserted that the hearing before the Masters was critically flawed so that he should have a new trial.

Appendix C

APPLICABLE LEGAL PRINCIPLES

When judicial misconduct is charged, the factual averments must be proved " 'by clear and convincing evidence sufficient to sustain [the] charge to a reasonable certainty.' " (*Dodds v. Commission on Judicial Performance*) (1995) 12 Cal.4th 163, 168, quoting from *Geiler v. Commission on Judicial Qualifications (1973)* 10 Cal.3d 270, 273; see also *People v. Caruso* (1968) 68 Cal.2d 183, 190; [t]he phrase, "clear and convincing evidence" has been defined as "clear, explicit, and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to demand the unhesitating assent of every reasonable mind." (citations omitted.))

The California Constitution authorizes discipline of judges for willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action or dereliction of duty. (California Constitution, Article VI, Sec. 18(d).) Two of these are pertinent here, i.e., alleged willful misconduct and conduct prejudicial

A. Willful Misconduct in Office

In *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172, the Supreme Court summarized its decisions defining the phrase willful misconduct in office as comprising three elements:

1. unjudicial conduct,
2. committed in bad faith,
3. by a judge acting in his judicial capacity.

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The Court's decisions over the years have given further definition to each of these elements. (*Dodds, supra, 12 Cal.4th at 172.*)

1. "Unjudicial conduct" is determined by reference to the California Code of Judicial Conduct. (*Dodds, supra, 12 Cal.4th at 172.*) (See generally, Rothman, California Judicial Conduct Handbook (Cal. Judges Assn. 1990).)

2. The words "bad faith" have acquired a special meaning over a long line of judicial discipline cases. At one point the Court referred to bad faith as being determined by a two-prong test. See, for example, *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1305 (rejecting a single-prong standard).[5] Any uncertainty, however, as to the Court's position was removed last year by the *Doan* case. Bad faith is determined on an either/or basis:[6]

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5. As recently as 1995, the Court said:

> The element of malice or bad faith, in turn, must meet a two-pronged test; the judge must have (1) committed acts he or she knew or should have known to be beyond his or her power, (2) for a purpose other than faithful discharge of judicial duties. *Adams v. Commission on Judicial Performance* (1994) 10 Cal.4th 866, 877-78.

6. Amicus CJA asserts that the test for bad faith is a two-prong test, and that *both* elements must be met in order to find bad faith. At oral argument, CJA's counsel acknowledged that the Supreme Court had adopted either/or language in its recent opinions, but characterized that language as being a "mistake." Transcript of Oral Argument, p. 92. The CJA position was expressly rejected by the Court's decision in *Doan* where the Court was called upon to decide whether Judge Doan, who

(Cont'd)

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> "Bad faith" on the part of a judge entails *either* an intent, motivated by "actual malice," to commit an act that he knows or should know is beyond his lawful power *or* an intent to commit an act, even within his lawful power, "for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." (emphasis by the Court) (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 311.)

In *Dodds*, the Court repeated the same concept in slightly different words:

> . . . by "bad faith" we mean that the judge "intentionally committed acts which he knew or should have known were beyond his lawful power" [citations omitted] or "acts within the lawful power of a judge which nevertheless [were] committed . . . for any purpose other than the faithful discharge of judicial duties" [citations omitted]. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172.)

(Cont'd)

had acted within her judicial power, could nonetheless be held guilty of willful misconduct because she acted with corrupt purpose. *Doan, supra*, 11 Cal.4th at 319-320, 323. As the Court explained, the use of a single-prong test would yield "untenable results, such as a conclusion that 'bad faith' could not characterize the mental state of a judge who tendered judgment in exchange for a bribe [an improper purpose] on the ground that the rendering of judgment was within his lawful power." *Doan, supra,* 11 Cal.4th at 319-320. Earlier opinions that might support the CJA's reading were cited and distinguished. *Id.*, p. 319.

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The Court also acknowledged its prior statements that "actual malice" is a necessary element of bad faith, but it went on to explain, "in this context actual malice does not connote hate or ill will, but merely specific intent." (*Dodds, supra*, 12 Cal.4th at 175.)

3. "Judicial capacity" refers to the actions of a judge

> . . . when he is performing one of his "judicial functions," i.e., one of the varied functions generally associated with his position as judge, whether adjudicative or administrative in nature. [citation omitted] In determining whether a judge acted in his judicial capacity, we give due weight to the location of the judge's conduct. [citation omitted] Thus, when a judge is on the bench, he is presumptively acting in a judicial capacity. [citation omitted] Similarly, when a judge is in chambers during normal working hours, he is generally, though not necessarily, acting in a judicial capacity (See, e.g., *Geller, supra*, 10 Cal.3d at pp. 277 and 284 [finding wilful misconduct based on conduct occurring in chambers].) In addition, if a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, we consider the judge to be acting in his judicial capacity. [citation omitted] (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172.)

B. Conduct Prejudicial

The *Dodds* opinion also states the familiar definition that "[u]njudicial conduct that does not rise to the level of wilful

misconduct, either because of a lack of bad faith or because the judge was not acting in a judicial capacity, may nevertheless constitute prejudicial conduct." This offense consists of two elements:

1. unjudicial conduct,
2. which brings the judicial office into disrepute.

This last element is conduct that "would appear to an objective observer to be not only unjudicial . . . but . . . prejudicial to public esteem for the judicial office.' " (citation omitted) (*Dodds, supra*, 12 Cal.4th at 172-3.)

THE FINDINGS OF THE COMMISSION

The Special Masters conducted hearings from July through December of 1995. After affording the parties an opportunity for briefing and argument, the Masters submitted a voluminous report consisting of majority, concurring, and minority views. Together the Masters' findings total 165 pages. The record developed in the proceedings before the Special Masters contains not only the Notice and Answer, but also some 5,500 pages of transcript, as well as some 93 exhibits (in evidence) containing another 850 pages. The Objections filed by the parties totaled almost 300 pages.

Each Commissioner has made an independent examination of this record to determine whether to accept or reject the Special Masters' Report and whether to recommend any level of discipline. After considering oral argument, the record before it, and exercising its obligation both to the public interest and to Judge Broadman, the Commission makes the following findings of fact and conclusions of law.

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Except where otherwise expressly stated, the Commission is unanimous that the facts set forth herein were proved by clear and convincing evidence. To the extent that these findings may differ from those of the Master, the Commission intends that these findings shall prevail.

UNDISPUTED FACTS

Judge Broadman was appointed to the Municipal Court in 1986 and elevated to the Tulare County Superior Court in 1988. He was elected in 1990, and re-elected in March 1996 (unopposed).

He has been an innovative judge, and he has numerous accomplishments which are detailed in the record and in the Masters' findings. While praise of Judge Broadman is not always unqualified, there is abundant evidence that he is sincere, intelligent, hard-working, creative, and anxious to improve the efficiency and cost-effectiveness of the court's operations.

PUBLIC COMMENT ON PENDING CASES

Count 2 concerns public comment on pending cases. The Special Masters determined as to Counts 2B and 2C that Judge Broadman had committed judicial misconduct and that such amounted to conduct prejudicial to the administration of justice. The Commission concurs.

In two cases arising in 1990-91, Judge Broadman imposed conditions of probation on female defendants that were ostensibly intended to prevent them from being pregnant during the period of their probation. In the *Zaring* case, the order simply prohibited the defendant from becoming pregnant. In the

Johnson case, the condition specified that the defendant was to be surgically implanted, subcutaneously, with the Norplant birth control device.

Both orders were appealed. The order in the *Zaring* case was reversed by the Court of Appeal on July 22, 1992. (Exhibit 17; *People v. Zaring* (1992) 8 Cal.App.4th 362.) The order in *Johnson* was vacated by a different Superior Court Judge, and Ms. Johnson's appeal was thereafter dismissed as no longer justiciable on April 19, 1992. (Exhibit 9.) There is no question that until April and July of 1992, Judge Broadman's no-pregnancy orders were on appeal and "pending" within the meaning of Canon 3A(6) of the Code of Judicial Conduct, which provided (in 1991);

> Judges should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to their direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.[7]

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7. Canon 3A(6) was revised and renumbered in 1992, and it was adopted — with additional revisions — as Canon 3B(9) of the California Code of Judicial Ethics, January 15, 1996:

> A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to

(Cont'd)

Appendix C

As a result of the no-pregnancy orders, Judge Broadman attained celebrity status. Beginning as early as January 1991, Judge Broadman was reported to have participated in television interviews about his no-pregnancy orders, was interviewed for a variety of publications including the New York Times, and television shows, such as CBS This Morning, 20/20 and 60 Minutes.[8] Prompted by these reports in the press, the Commission commenced a preliminary investigation under Rules 904 and 904.2 of the California Rules of Court. Judge Broadman was advised of this investigation by letter dated March 18, 1991. (Exhibit 33.)

(Cont'd)

> the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

8. Exhibit 33. Judge Broadman admitted granting interviews and by letter dated April 4, 1991, he confirmed:

> The allegations regarding the New York Times NBC Today Show and CBS This Morning Show are true in that I was interviewed by these news agencies. . . . I was not interviewed by 20/20. An interview with 60 Minutes was taped. (Exhibit 34.)

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On March 18, 1991, the Commission wrote to Judge Broadman and expressly advised of the Commission's concern that, since the *Johnson*/Norplant order was then on appeal to the Court of Appeal, his comments to the media

> . . . allegedly created the appearance of seeking to influence the decision in any appeal that might be lodged and undermined [sic] public confidence in the objectivity and impartiality of the judiciary. (Exhibit 33 (letter from Commission on Judicial Performance dated March 18, 1991).)

Judge Broadman responded to the Commission's March 18 letter and acknowledged that he had participated in the interviews. The Commission accepted Judge Broadman's response and in reliance upon it closed its preliminary investigation. Judge Broadman's four-page letter provided a factual basis for the Commission's action, *viz:*

"I am now and since I became a judge fully aware of Canon 3A(6)."

"Please be aware that I have declined to appear on the following: Larry King Live, Opra [sic], Phil Collins Home Show, Sally Jessie Raphael, 20-20, Geraldo, Jane Pauley, as well as many others."

"Media keep asking me about this case and I have nothing more to say concerning the matter."

"I hope this letter and your review of the enclosed transcripts with the respective media coverage will resolve all of the questions in my favor. . . ." (Exhibit 34 (letter from Judge Broadman, dated April 4, 1991).)

Appendix C

The correspondence between the Commission staff and Judge Broadman came before the Commission at its meeting in May, 1991 (Exhibit 35.) As noted, the Commission determined to close its preliminary investigation as to the public comment issue, but in doing so, it instructed its Director-Chief Counsel to send an advisory letter which provided in part:

> In making this determination [to close the investigation on the public comment issue], the commission asked me to express its strong reservations concerning your conduct in commenting to the media on a pending case and granting interviews in which you discussed your decision; resulting in nationwide coverage. Your comments in that national coverage was not confined to procedural explanations, in violation of Canon 3A(6) of the Code of Judicial Conduct, which narrowly restricts comment on cases pending or impending in any court.
>
> Regardless of your intent in making such comments, it is the commission's view that your conduct detracted from the appearance of impartiality and fairness during the pendency of proceedings and gave rise to a perception that you actively sought the publicity about your decision. In this regard, the commission directs your attention to Canon 2 of the Code of Judicial Conduct, which addresses the appearance of impropriety, in addition to Canon 3A(6). (Exhibit 35 (Letter from Commission on Judicial Performance dated May 16, 1991).)

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Judge Broadman testified that he recognized the May 16, 1991 letter as being an "advisory letter." He also referred to it as a "stinger letter," and he said that he understood it as a "slap." (H.Tr., pp. 1152-54.)

The Commission thus finds that Judge Broadman was aware of the provisions of Canon 3A(6), and that he was aware Canon 3A(6) applied to proceedings which were pending on appeal, specifically his no-pregnancy orders in the *Johnson*/Norplant case and the *Zaring* case.

Count 2B

Following receipt of the Commission's advisory letter in 1991, Judge Broadman was contacted by Janice Castro of Time Magazine. She telephoned to request an interview to be conducted in a question and answer format on the subject of sentencing. Judge Broadman agreed to the interview and Ms. Castro traveled from New York to California to meet with Judge Broadman at his home. (Exhibit 32, pp. 20-26.) Judge Broadman gave the interview and made inappropriate comments about the then-pending *Johnson*/Norplant case.[9]

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9. To illustrate the nature of the comments, the Time Magazine article quotes Judge Broadman as stating:

> Would it have been better simply to lock her up? In my heart, I felt it was compassionate. She was flunking parenting. She needed help. She needed to take care of the child she was bearing and to complete the conditions of her probation. I thought if there was less stress on her, if she did not have still another child right away, that she might be able to do all these things. I kept her in the community.

(Cont'd)

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The fact that Judge Broadman made comments to Ms. Castro in violation of Canons of Judicial Ethics was conceded before the Masters (Majority Report, p. 69). At oral argument before the Commission, his counsel conceded the impropriety of that interview, "without a doubt." (Transcript of Oral Argument, page 70.) Judge Broadman's comments, particularly in a national publication such as Time Magazine, are not only unjudicial, but prejudicial to public esteem for the judicial office.

The Commission concludes that with respect to Count 2B, Judge Broadman committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission's vote was unanimous.

Count 2C

Judge Broadman was also interviewed by Journalist Kathy Holub of West Magazine. His statements to her became the basis for an article which was published on July 7, 1991. These statements are in the record as stipulated facts and include:

"With regard to the Linda Zaring case, Judge Broadman asked Kathy Holub, 'Have you heard the horrible story about the lady that I sent to prison?' "

(Cont'd)

> I sentenced her to 365 days in the county jail, and parenting classes and mental-health counseling. I thought it would help her. (Exhibit 31.)

The Commission does not take issue — one way or the other — with the truth, wisdom or accuracy of Judge Broadman's statements. The sole issue before the Commission is one of judicial misconduct arising from comments by a sitting judge about the merits of a pending case.

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"In response to Kathy Holub's questions about his Norplant decision, Judge Broadman responded, 'There's no question that (Norplant) is an invasion, but judges do that all the time.' "

"In response to Kathy Holub's question regarding why he didn't ask about Darlene Johnson's religious views of birth control, Judge Howard Broadman responded, 'She is Baptist . . . If someone was Catholic and it was against their religion . . . You're asking me to speculate.' " (Exhibit 30, paragraphs b, d, and h.)

Such comments are not only unjudicial, but prejudicial to public esteem for the judicial office.

As with Count 2B, Judge Broadman admits making public comment about a pending case in violation of the Canons of Judicial Ethics. The Commission concludes that with respect to Count 2C, he committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission's vote was unanimous.

Count 2A

With respect to the allegations of Count 2A, they were in part summarized in the March 18 advisory letter. The Masters found that the allegations of that count must fail for lack of prosecution. This issue was neither briefed nor argued and, in view of the Commission's findings of conduct prejudicial as to Counts 2B and 2C, and in view of the potential for overlapping sanctions, the Commission will dismiss Count 2A. The Commission observes, however, that Judge Broadman's Answer to Count 2A admits "comments about matters occurring in *People* v. *Johnson* were made to the media." (Answer, Count Two, par. A, p. 4)

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THE ALLEGATIONS OF EXCEEDING JUDICIAL POWER

Count One of the Notice alleged in general terms that Judge Broadman failed to comply with the law in enumerated instances and that such failure constituted a "gross abuse of judicial power." Count 1D went further and alleged that Judge Broadman's actions in the *Hooks* case were both "deceptive and a gross abuse of your judicial power."

Abuse of judicial power necessarily begins with an incorrect ruling or error of some sort in assessing the boundaries of what is within or without the law. Error alone, however, is not a ground for discipline:

> An independent and honorable judiciary is indispensible to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. *A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code.* (Emphasis added.) (Canon 1, Cal. Code Jud. Ethics.)

Both the Commission and the Court have consistently eschewed any attempt to impose discipline upon judges solely because they reached the wrong decision on a factual or a legal issue. (*Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 47-48.) Likewise, the fact that a judge makes a

decision on an unpopular subject, or makes an unpopular ruling is not a ground for discipline.

Few things could do more harm to the judiciary than a belief that "staying out of trouble" is the first principle of judging. The consequences of such a belief are well stated by Judge David Rothman, author of the CJA publication California Judicial Conduct Handbook:

> I have a real concern that a focus on behavior to avoid discipline will have a stifling effect on judges as individuals. Most judges are interesting characters with ideas about solving the problems they face everyday — crime, family disintegration, abuse of children, emerging social issues. Our personalities and our differences are important to the fabric of the judicial system, and we must not become a group of faceless bureaucrats who fit into a mold to stay out of trouble. (Rothman, *Are Judges Barking Up the Wrong Tree?*, The California Bench (Cal. Judges Assn. Spring 1996.)

Counts 1A and 1B

Counts 1A and 1B arose out of the no-pregnancy conditions of probation in the *Johnson* and *Zaring* cases mentioned above. In *People v. Johnson*, Judge Broadman asked the defendant at the time of sentencing if she wanted any more children, and when she said no, he proposed the use of the Norplant contraceptive device as a condition of probation. This was done in the absence of Ms. Johnson's regular counsel. Ms. Johnson indicated assent to the Norplant suggestion, and Judge Broadman thereupon ordered that she obtain the device as a condition of probation. (Exhibit 2, pp. 6-8, 10-11.)

Several days later, Ms. Johnson filed a motion through her regular attorney seeking to set aside that condition of probation. Judge Broadman denied the motion on the ground that the prior assent had been knowing and voluntary. (Exhibit 5, p. 17.)

People v. Zaring was similar in that Judge Broadman imposed a condition of probation that prohibited the defendant from becoming pregnant for a period of five years. (Exhibit 11, p. 4.)

As stated above, the Notice charged in both cases that Judge Broadman grossly exceeded his lawful authority in imposing the no-pregnancy conditions of probation. Thus the issue presented in this proceeding is not the legality of no-pregnancy orders. The Courts of Appeal have dealt with that subject. For judicial discipline purposes, the question is whether Judge Broadman's error was "a gross abuse of legal power." The Masters found the evidence was insufficient to sustain that contention. The Commission agrees and will dismiss Counts 1A and 1B.

At the hearing below there was considerable evidence as to whether Judge Broadman "tricked" Darlene Johnson into accepting the Norplant condition and then took unfair advantage of her in refusing to modify the condition. Two of the Masters accepted this theory of misconduct as being charged in the Notice, concluded that Judge Broadman had deceived Ms. Johnson, and found willful misconduct.

The Commission finds that trickery or deceit was not charged in the Notice of Formal Proceedings and, to the extent that it was tried in the hearing below, it was not proven. As stated, the Notice charged only that Judge Broadman exceeded

his lawful power by imposing the Norplant condition. It did not charge that he committed misconduct in any other respect, and it did not charge that he acted for some improper or corrupt purpose.

The Commission's conclusion that the Notice did not charge trickery or deceit by Judge Broadman is compelled by the wording of the Notice. As discussed below, Count 1D expressly charges Judge Broadman with "deception" in the *Hooks* case, and specifies that deceit was used to obtain a waiver of a defendant's right to a speedy trial. The Commission construes the absence of the word "deception" in this count concerning *Johnson* as strong evidence that "deception" was not intended as an issue.

Counts 1A and 1B are dismissed. The Commission's vote was 10 to 0, one Commissioner abstaining.

Count 1C

On November 19, 1990 probationer Linda Zaring was scheduled to appear in Judge Broadman's court. The time specified was 8:30 a.m., and the record is clear that Ms. Zaring understood that she was to be in court at that time. In setting the time, Judge Broadman admonished Ms. Zaring, "If you're not back in this courtroom at 8:30 A.M. on Monday morning, you're going to prison." (Exhibit 17, *People v. Zaring* (1992) 8 Cal.App.4th 362, 365-66.)

Ms. Zaring did not appear at 8:30 a.m., and when Judge Broadman was informed that she was not present, he said: She's going to prison. That's the end of the story with Mrs. Zaring . . . She's supposed to be here." (Exhibit 13, p. 2). When

she did arrive at 8:52 a.m., he said: "Miss Zaring, you're remanded to the custody of the Tulare County Sheriff and placed on for a violation of probation hearing [i.e., the matter is set for hearing] on December the 3rd. Bail set in the amount of $25,000." (Exhibit 13, p. 3.)

On November 19 Judge Broadman did not ask for any explanation for the tardiness of 22 minutes. On November 27th he held a probation revocation hearing and Ms. Zaring explained that she was delayed by obligations to her children. Judge Broadman nonetheless revoked her probation.

The Court of Appeal reversed:

> . . . We therefore conclude that the appellant was confronted with a last minute unforeseen circumstance as well as a parental responsibility common to virtually every family. Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. However, as a result of last minute circumstances, the appellant was approximately 22 minutes late to court, having driven some 35 miles from her home to the courtroom. [Footnote omitted.] Collectively, we cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a wilful violation of that condition. [Footnote omitted.] Judge Broadman's action in revoking appellant's probation under the circumstances presented herein and for the reasons stated by Judge Broadman are

> an arbitrary and capricious use of the court's power and constituted an abuse of discretion. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379. Exhibit 17.)

The Court of Appeal having found arbitrary and capricious conduct constituting an abuse of discretion, the issue before the Commission is whether this is also judicial misconduct.

As discussed above, error alone is not a basis for a finding of misconduct, whether it be harmless error or arbitrary and capricious action amounting to an abuse of discretion. To repeat, the Commission concerns itself not with error but with misconduct.

Count 1C of the Notice of Formal Proceedings alleges that misconduct was committed because Judge Broadman's orders were in gross disregard of Penal Code section 1203.2(b) and a gross abuse of his judicial power. The Special Masters could not agree on this charge; two found conduct prejudicial and the other found no misconduct. (One Master found not only conduct prejudicial, but willful misconduct.)

Two of the Masters concluded that Judge Broadman willfully ignored his obligations as a judge:

> The only reasonable explanation we can find for Respondent's actions in summarily remanding Ms. Zaring into custody, and in revoking her probation without any evidence of wilfulness, is that he acted from anger and pique over what he perceived to be her failure to appreciate what he was trying to do for her [in substituting a drug treatment program for time in prison]. He wilfully ignored his obligations as a judge (Maj. Rpt., p. 27.)

However, an equally plausible explanation on the record before us is that Judge Broadman did not know the correct procedure for handling the revocation of probation and thus committed error, albeit error so severe that the Court of Appeal referred to it as arbitrary and capricious, amounting to an abuse of discretion. Given the good faith disagreement among the Masters on this subject, the Commission cannot find that there was clear and convincing evidence of misconduct on the part of Judge Broadman.

Count 1C is dismissed. The Commission's vote was 10 to 1.

Count 1D

Count 1D arises from Judge Broadman's action in *People v. Hooks* on January 5, 1995. Defendant Hooks, who was 29 years-old, had been convicted on five counts of repeatedly raping a 15 year-old girl, together with other offenses and enhancements. Mr. Hooks was HIV positive.

On January 5, Hooks was before Judge Broadman for sentencing. At that time Judge Broadman said:

> This is the case of People versus Levert Hooks. I would like a time waiver on this case because I would like to present some questions to you folks before we impose sentence in this case for you to think about and to do some research on. (Exhibit 27, p.1.)

Mr. Hooks' counsel asked:

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> Can I inquire as to what you plan on doing between now and then in this case? It's a long delay. We don't mind. I'm just wondering what you're up to. (*Id.*, p. 2.)

Judge Broadman responded, "Trust me." *Id.* Mr. Hooks and his counsel then indicated agreement to Judge Broadman's request for a time waiver.

The victim of the crime was present in court, and after she had made a statement on the record, Judge Broadman resumed:

> THE COURT: Thank you. This case in my viewpoint presents some other very important and very interesting issues than that which we see in normal type cases. And that's based on Mr. Hooks' status as being HIV positive.
>
> I know that Mr. Hooks has a previous rape conviction. And I was listening to KBPR (*sic*, KVPR, a public radio station (H.Tr. 5044)] a couple of days ago. They said that the cost for treating an HIV patient once it got into it was approximately a hundred thousand dollars a year.
>
> The suggested term for Mr. Hooks is 40 years. His life expectancy is nowhere near those 40 years. To my knowledge no person has ever recovered from HIV. Since he is HIV positive, the question comes up what resources should the state use to continue to sustain his life.

I have the following questions: Do I have the power to order that the government not treat him for the HIV, that is to extend his life?

* * *

What I have thought of is a potential order that once the conviction is final that the government doctors shall not be required to provide prophylactic medicine or medicine to treat the incurable disease, but rather shall be required to provide him with food, hydration, and pain medication. . . .

Mr. Hooks, through his counsel, immediately responded:

MR. ROTHBAUM: Your Honor, I think Mr. Hooks wants to withdraw his previously entered time waiver and be sentenced right now.

THE COURT: That's denied. (*Id.*, pp. 4-7.)

Mr. Rothbaum vigorously asserted that the purported time waiver was revoked, stating among other things:

[W]hat you've basically done today is to extract from Mr. Hooks, without him knowing it, a waiver of time in order for you to be able to divest him, if you can, of what he at the present time is entitled to, which is medical care while he is in custody of the California Correctional System.

There is no way that he is going to assist the

court in divesting him of medical treatment if, in fact, he needs it and he's entitled to it. That's what you're asking us to do.

You're asking him to let you have two months to see if you can screw him basically. That's not right. That is not right. And I didn't understand it.

I certainly had no understanding of what was going on here when you made the request for the time waiver because you didn't tell me what it was about. And I certainly can't join in the entry of a waiver once I know the reason for it.

It wasn't a knowing — it wasn't a knowing waiver. Any waiver, you know, that a person enters has to be knowing. . . . (*Id.*, pp. 12-13.)

Nonetheless Judge Broadman ruled:

I find that at the time that he made the waiver it was a knowing, intelligent, voluntary waiver in the sense that all I asked him to do was waive it for 60 — until the date. And he knew that he was waiving it. He may not have known why, but he knew he was waiving time. And the rationale past that is irrelevant (*Id.*, p. 14.)

Count 1D of the Notice alleges:

On January 5, 1995, in *People* v. *Hooks* (No. 34911), you procured a waiver of time for sentencing

> without specifying its purpose, although defense counsel inquired. You then disclosed its purpose (to research whether you had authority to order that Hooks, apparently HIV-positive, be denied medical treatment for that condition while incarcerated) and, when counsel asked to withdraw the waiver, denied his request. Your actions were deceptive and a gross abuse of your judicial power. (Third Amended Notice, p. 3)

The Masters found that the factual allegations of this count were true. The Commission agrees that such allegations were proven by clear and convincing evidence.

Once Judge Broadman sought a waiver of time for his own purposes, i.e., not for some legitimate administrative purpose of the court's, he became something other than a disinterested arbiter of disputes. He did not reveal this self interest, except when he offered his personal assurance, "trust me." These words, coming from a judge while sitting on the bench, could have only one meaning, one of assurance that the requested waiver would not adversely affect defendant Hooks. As revealed by Judge Broadman's subsequent demand for briefing, that assurance was untrue.

The transcript of January 5 (Exhibit 27), and the following transcript of January 9th (Exhibit 28), provide clear and convincing evidence that defendant Hooks and his counsel were in fact deceived. In fact, Judge Broadman admitted, "They could legitimately believe that" they were deceived. (H.Tr. 5026-27.) The next morning, following the hearing, there was an article about the delay in sentencing Mr. Hooks in the morning newspaper. (Exhibit 101, H.Tr. 5068-69.)

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On January 9, 1995 Judge Broadman re-called the matter. At that time, he acknowledged that the "trust me" statement was misleading, and agreed that it was error on his part to reject Mr. Hooks' effort to withdraw the time waiver. (Judge Broadman also used the hearing as an opportunity to justify his views on the misallocation of resources, and then sentenced defendant Hooks to 50 years in prison.)

Judge Broadman's conduct in the *Hooks* incident could plainly be willful misconduct under the definitions set forth above. The Commission may, however, view such conduct as amounting to a lesser charge where the judge has acted promptly to correct his action. *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1309.

> . . . [The evidence] would support a finding that he acted with malice and that sending the note thus constituted wilful misconduct. Despite the obvious and grave impropriety of petitioner's action, the masters and Commission legitimately concluded that in light of the petitioner's inexperience and his admission soon afterwards that his action was wrong, he engaged only in prejudicial conduct. (See also 43 Cal.3d at 1308 applying the same principle to the Kabbaze incident.)

The Commission will apply the *Furey* principle in this instance and find conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission finds no credible excuse offered by the judge for what appears, by clear and convincing evidence, to be a lack of candor on his part. It is plain from the evidence that when asked by counsel for his reasons for requesting the waiver ("what are you up to"), the judge did not give his true reason, knowing that if he did, the waiver would not have been given.

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The excuses and explanations offered by Judge Broadman for his conduct do neither him nor the administration of justice any credit. Both he and the institution he represents would have been better served by an acknowledgment of the wrong he committed. But for the fact of his setting aside the waiver obtained by deceit, the Commission would have found willful misconduct.

Judge Broadman's handling of the *Hooks* case on January 5, 1995 constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute in the *Hooks* incident. The Commission's vote was 9 to 2 (two to dismiss).

THE KRALOWEC COUNTS (1E and 3A and 3B)

A substantial portion of this case arises from Judge Broadman's relationship with an attorney named Arthur Kralowec. The three Special Masters were unanimous in characterizing the relationship between the two as being one of hatred. That this hatred was intense, long-standing, and increasingly bitter is beyond doubt. In his testimony, Judge Broadman referred to Krawlowec as "evil incarnate" and a "sociopath afflicted with FLK syndrome" (meaning Funny Looking Kid). In conversation with others, Judge Broadman referred to Kralowec as a "son of a bitch." (Maj. Rpt., p. 49; Min. Rpt., pp. 39, 41.) During the hearing, Judge Broadman referred to Kralowec as "extremely, extremely vindictive" and "malicious." (H.Tr. 1534-35.)[10]

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10. Judges have opinions and are entitled to express such privately and publicly, subject to the strictures of the Canons. Thus in *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615 it was not

(Cont'd)

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Additionally, during the summer of 1994, Judge Broadman was a defendant in litigation being prosecuted by attorney Kralowec. That litigation, which included depositions of Judge Broadman, his wife, and his mother, was an additional cause of bad feeling.[11]

(Cont'd)

misconduct for a judge to privately refer to a defendant as being a "psychopath," (p. 635) (although the Court held that other aspects of the same conversation constituted willful misconduct in office). Similarly, the fact that Judge Broadman has negative opinions as to attorney Kralowec's honesty or other character traits is not the basis for discipline.

11. Judge Broadman's reaction to those depositions is described by him in the following testimony:

> Q. Without going into the nature of that dispute on Woods versus Broadman, will you agree with me that as part of that lawsuit, Arthur Kralowec has deposed you personally?
>
> A. I certainly will, abusively, so.
>
> Q. How many days of depositions have you endured with him?
>
> A. I think five.
>
> Q. And when I use the word "endured" to describe your experience, would you agree that's apt?
>
> A. No.
>
> Q. Can you give me a better description?

(Cont'd)

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Nonetheless, Judge Broadman asserted in his Objections to the Final Report of the Special Masters that: "There is no evidence in the record that Respondent hated Mr. Kralowec." (Objections, p. 90.) The record is overwhelming in its support for the Masters' findings on the subject, and the Commission therefore adopts the Masters' findings of hatred and long-standing animosity between Judge Broadman and Kralowec as its own. The record shows that this relationship goes back to events prior to the time that Judge Broadman assumed the bench. (H.Tr. 1494-97.) There are also episodes of interaction between Judge Broadman and Kralowec over the years that follow, notably Judge Broadman's efforts to enforce a sanction order against Kralowec in the case of *Carter v. City of Porterville* (which is the subject of Count 1E), Kralowec's representation of the plaintiff in a malpractice action against Judge Broadman entitled *Woods v. Broadman*, Judge

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(Cont'd)

> A. I think your vocabulary is better than that, and I think you are going to find an adjective that's harder than endure.
>
> Q. It's been personally extremely trying for you to sit through those depositions?
>
> A. Not a good one, but you are getting closer.
>
> Q. Why don't you help me out with the description?
>
> A. Miserable experience, abusive process, a waste of time, an entertainment, where he got to see somebody in a position of authority who was at his mercy, and who was required to respond to his whim. That exemplifies some of the evil that I spoke of. (H.Tr. 1527-1528; see generally H.Tr. 1529-30, 1533.)

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Broadman's efforts to assist the plaintiff in a malpractice action against Kralowec (*Metzger v. Kralowec*, which is the subject of Count 3A), and Judge Broadman's ejection of Kralowec from his courtroom on August 22, 1994 (which is the subject of Count 3B).

Count 1E

Count 1E arises from Judge Broadman's decision in the case of *Carter v. City of Porterville*. That case had already been tried once in the Tulare County Superior Court (not before Judge Broadman), and the court declared a mistrial due to attorney misconduct. The attorney was Arthur Kralowec. Sanctions were awarded to the City of Porterville in the amount of $43,312.70. (Exhibit 19.)

Plaintiffs, through attorney Kralowec, then moved in Judge Broadman's department for a preferential trial date for the re-trial, because of the plaintiffs' advanced age. (Cal. Code Civ. Proc., section 36.) Judge Broadman granted the motion but, in apparent reliance upon the arguments of the City of Porterville, conditioned the preferential trial date either upon payment of the earlier sanctions, or replacement of attorney Kralowec with another lawyer. (Exhibit 22, p. 2.) That order was reversed by the Court of Appeal.

The Notice alleges that Judge Broadman's ruling constituted a gross abuse of the judicial power.

The Masters concluded that the evidence was insufficient to establish that Judge Broadman's order, while erroneous and in clear conflict with published Court of Appeal decisions, was so demonstrably wrong that it grossly exceeded his judicial

power. The Commission agrees that the charge must be dismissed for failure of proof. The Commission's vote was 10 to 0, with one Commissioner abstaining.

Count 3A

Count 3A relates to the following. Attorney Kralowec was being sued in the Tulare County Superior Court for legal malpractice. The attorney for the plaintiff in that matter was Thomas Anton. The record does not reflect any prior relationship between Judge Broadman and attorney Anton. Count 3A alleges that during February and March 1995 Judge Broadman:

> offered to assist plaintiff's counsel Thomas Anton, met with Mr. Anton in your chambers at your invitation to discuss the case, attended the trial when Mr. Kralowec was testifying, and asked Mr. Anton about the case in the court hallway. Your conduct showed disregard for the integrity of the bench and for your judicial obligation to display fairness and impartiality regarding cases in which you are not a litigant. (Third Amended Notice, Count 3A.)

Judge Broadman's Answer admits the factual allegations of this paragraph but denies the legal conclusions. The factual allegations are therefore true, as the Masters found, and the Commission adopts that finding.

While the *Kralowec* trial was in progress, Judge Broadman invited attorney Anton to meet with him in chambers, and at that time, Judge Broadman expressed his dislike for Kralowec. He offered to assist attorney Anton and while in chambers,

telephoned the clerk of the court to request that a file be pulled for Mr. Anton, telephoned the State Bar and requested a status report on a complaint about Kralowec, and told Anton that he hoped he would "kick the son of a bitch's ass." (H.Tr. 191.)

During the meeting in chambers, Judge Broadman told Anton of facts about Kralowec for the purpose of assisting attorney Anton in cross-examination, facts which if brought out in cross-examination, Judge Broadman believed, would be to Kralowec's detriment.

Following the meeting in chambers, Judge Broadman repeated his hope that attorney Anton would "kick [Kralowec's] ass," and asked him to keep "that meeting in chambers to ourselves." (H.Tr. 197-98.)

The malpractice trial against Kralowec involved events which arose while Kralowec and Judge Broadman were opposing counsel. As a result, Judge Broadman's name arose repeatedly during the trial, perhaps 150 to 200 times. (H.Tr. 170.) During the trial, while Kralowec was on the stand, Judge Broadman entered the audience portion of the courtroom and sat down. He remained for a short period of time and left. This visit was noted and discussed by the jury. (H.Tr. 263-264). One of the jurors testified:

> MR. WILEY: Q. When you say that jurors talked about Judge Broadman's entering into the courtroom —
>
> A. Yes.

Q. — how many of them talked about it??

A. Several.

Q. Did the jurors talking about Judge Broadman's entering into the courtroom speak in small groups or as the jury together?

A. As the jury together.

Q. And how many jurors were there?

A. 12 at that time.

* * *

Q. Without saying what the conclusion was, did the discussion among the jurors include their reactions to the judge's entry, without saying what the exact reaction was?

A. Yes, uh-huh.

Q. Did you yourself — without saying what your own reaction is, did you yourself have a reaction to the news that the jurors told you that Judge Broadman had entered the courtroom at that time?

A. Yes, yes. (H.Tr. 263-64)

When asked why he would enter the courtroom under those circumstances, Judge Broadman responded he was "just being an asshole." (H.Tr. 5188.) That led to this explanation:

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PRESIDING SPECIAL MASTER AVAKIAN: Excuse me. I don't understand what you're trying to convey to us as your state of mind about the propriety of what you did. Was it a proper thing in the sense of the Code of Judicial Conduct for you to have gone into the courtroom at that time?

THE WITNESS: Well, I believe it was, I do it all the time. Why it was particularly in this case was because as I've described to this court, and I think I'm not the only one, I think that you have had nobody who has said anything good about Arthur Kralowec, a man I believe is a sociopath. I believe he was going to commit a fraud on a jury and a judge, and I thought by my mere presence that there was a far greater chance for there to be honesty than if I were not sitting there, and I believe that that is not only right, but I think that there are those who can make a very effective argument that it is not only right but it is the duty to prevent a fraud. (H.Tr. 5188-89.)

When asked whether he thought it was appropriate to make a conscious effort to influence the outcome of a trial pending in front of another judge, Judge Broadman answered:

THE WITNESS: I think it is the duty of a judge in any case to assure that truth happens. If that includes the minor thing of exercising a constitutional right to walk into a jury trial and sit back in the back, the answer is yes. If it includes providing information to a lawyer that is otherwise being kept secret, the answer is yes. I will also state if the answer is no,

> that you shouldn't do that, then you shouldn't — then you're going to have to make a decision of whether or not it's better to be a citizen or a judge. (H.Tr. 5195.)

"To assure truth happens" is the duty of the trial judge assigned to the case. It is not the duty of a Superior Court judge to use his position and influence in order to vindicate old grievances. Judge Broadman was acting as a vigilante, not as a judge. The Code of Judicial Ethics sets forth standards for judges, and to the extent that it imposes restraints that are not imposed upon non-judges, that is the price that a citizen pays for donning the robes. For a citizen to voluntarily participate in a trial pending in one judge's courtroom is one thing; for a judge of the same court to do so is quite another.

In a similar case, Judge Furey engaged in a personal vendetta against Ms. Cuskaden who, like attorney Kralowec, was his nemesis. On one occasion Judge Furey disqualified himself from hearing a Cuskaden case, and then sent a letter to the transferee judge with unsolicited advice. Again, the purported justification

> . . . was merely to warn Judge Herrington and protect the court from possible misrepresentation. The masters, to whom we customarily defer in questions of the credibility of witnesses, characterized his explanation as "disingenuous" and stated that the gratuitous transmission of his views to Judge Herrington following his disqualification was done for vindictive and punitive motives. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1316.)

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Likewise, with respect to Judge Broadman's assertion that he acted to prevent some sort of fraud on the court, the Masters found to the contrary:

> . . . his motivation was a desire to bring about a result harmful to Kralowec because of the personal animosity between them. We believe that he was so consumed by his hatred of Kralowec that it blurred his vision of the nature and scope of the alleged fraud and his judgment as to what to do about it. (Maj. Rpt., p. 66.)

By the conduct above described, Judge Broadman violated Canons 1 and 2 of the Code of Judicial Conduct.

The next question is whether Judge Broadman's conduct involves bad faith. As is evident from the discussion above, the issue is whether he either acted in excess of his judicial power, or for any purpose other than the faithful discharge of his judicial duties. The evidence is clear and convincing that Judge Broadman acted deliberately and intentionally to harm his old adversary and to cause him grief. While acting in the role of judge, while bearing the trappings of a judge, and while being known as a judge and carrying the mantle of judge, Judge Broadman engaged in actions other than the faithful performance of his duties. He acted to hurt Kralowec. These facts establish bad faith under *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163 and *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294.

Although these facts clearly point toward willful misconduct, the holdings of *Dodds* and *Kennick* must also be examined. In both bases the Court narrowed the concept of

judicial capacity, the third element required for a finding of willful misconduct.

In *Dodds*, Judge Dodds (and other members of the courthouse staff) witnessed an act of vandalism by another judge. Judge Dodds allegedly withheld information from the authorities and was claimed to have participated in a cover-up of the incident by advising the members of the courthouse staff that they need not cooperate with the authorities. These circumstances met the test for "bad faith," not only because of a corrupt purpose (to protect another judge), but as the Court also held, Judge Dodds' urgings exceeded his lawful power as judge. (12 Cal.4th at 174.)

The Court held, however, that Judge Dodds' claimed interference with the police investigation did not occur in his judicial capacity, because he was not performing one of the functions generally associated with his position as a judge. (*Id.*, at p. 175.) With respect to the contention that Judge Dodds was recognized as a judge by all of the courthouse staff, the Court explained:

> . . . To hold that petitioner acted in a judicial capacity simply because his advice carried with it a degree of authority due to his status as a judge and supervisor would mean that a judge is always acting in a judicial capacity when he talks to staff. We decline to interpret "judicial capacity" so broadly. (12 Cal.4th at 175.)

Similarly in *Kennick*, Judge Kennick asked the Highway Patrol for "preferential treatment" following his arrest for driving a motor vehicle while under the influence of alcohol.

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Following his arrest he visited the Highway Patrol office, where he was already known as a judge, and told the Sergeant in charge of his case that he "would like to make a deal or something," and asked if the paperwork could get lost. (50 Cal.3d at 317.) The Court held:

> The mere fact of this common knowledge [that petitioner was known as a judge] is insufficient to establish that petitioner was acting in a judicial capacity during the conversation in which he made the requests for special treatment. . . . [P]etitioner made his improper requests in a conversation that took place wholly outside any judicial setting. There is no evidence that he even referred to his judicial status on that occasion. (*Id.*, p. 319.)

In both *Kennick* and *Dodds*, because each was a judge and engaged in conduct in violation of the Canons of Judicial Ethics, the Court held that conduct prejudicial to the administration of justice that brings the judicial office into disrepute had been committed. Willful misconduct was not found, since neither judge was acting in a judicial capacity.

Guided by the teaching of *Dodds* and *Kennick*, the Commission finds that Judge Broadman was not acting in a judicial capacity, and thus he did not commit willful misconduct in the Kralowec matter. As the Supreme Court cautioned in *Dodds*, not all actions of a judge in chambers are to be regarded as being within a judicial capacity (12 Cal.4th at 172), and this principle necessarily applies to other areas of the courthouse as well. The fact that a court clerk or people at the State Bar offices may respond more promptly to a Judge Broadman as

opposed to a Mr. Broadman is reflective of a fact of life, but not that Judge Broadman was acting in a judicial capacity.[12]

In engaging in the conduct above described in *Metzger v. Kralowec*, Judge Broadman committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission's vote was 6 to 5 (five to dismiss).

One further aspect of Count 3A requires comment. The Notice did not charge that Judge Broadman used courthouse personnel or otherwise involved the courthouse staff in his activities. The facts, however, showed that Judge Broadman did involve courthouse personnel, even to the extent of monitoring the progress of the *Metzger v. Kralowec* case through regular interviews of the court reporter and others. Since the Notice did not allege those abuses of the judicial office, they were not considered by the Commission in reaching its conclusions as set forth above.

Count 3B

Count 3B alleges that on August 22, 1996 Judge Broadman peremptorily ordered Kralowec out of his courtroom. The facts show that while a hearing was in progress Kralowec entered Judge Broadman's courtroom, gestured that he wanted to talk to the clerk,[13] and Judge Broadman ordered him to leave: "Mr. Kralowec,

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12. In describing the telephone call to the State Bar, Judge Broadman testified that he probably said to the person answering the telephone: "This is Howard Broadman, I'm a judge in Tulare County Superior Court." (H.Tr. 1519.)

13. The clerk kept the trial calendar with her at her desk in Judge Broadman's courtroom, and although at some later date it became common for attorneys to approach the clerk while court was in session for trial setting purposes, that practice was not in effect on August 22, 1994. (H.Tr. 2364-65.)

you can leave the courtroom. You can leave the courtroom, Mr. Kralowec." (H.Tr. 2299.)

Judge Broadman's testimony was that he perceived potential problems with Kralowec in his courtroom and in order to avoid those problems, he told him to leave. The allegation of the Notice is that this conduct "showed a lack of judicial temperament and impartiality." There was no substantial evidence in the record to show how the exclusion of Kralowec constituted a showing of lack of impartiality. No other attorney was identified in the record as being similar to Kralowec, nor posing the same potential problems he did. With respect to alleged lack of judicial temperament, the Commission has listened to the tape recording of this incident. For all that appears on the tape and the accompanying transcript, Judge Broadman's demeanor and judicial temperament was ordinary and not worthy of comment. His action, therefore, does not constitute misconduct, and this allegation will be dismissed. The Commission's vote was 11 to zero.

The Commission is mindful that all three masters found this incident to constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Two of the Masters found it to constitute willful misconduct.

The Masters appeared to be influenced by the enmity Judge Broadman had displayed to Kralowec and to his obvious antipathy toward Kralowec as manifested by the evidence in the *Metzger v. Kralowec* trial (which took place six months after the ouster incident). The Commission, however, is constrained by the requirement that there must be clear and convincing evidence of misconduct. It accepts the claim that Judge Broadman acted on this occasion to avoid a confrontation

with Kralowec which could have disrupted court proceedings. One Master gave full credit to this testimony but held essentially that Judge Broadman "jumped the gun" and should have waited for evidence of bad behavior before acting. The Commission's view is that it will not second guess a judge on temperate steps taken to maintain order in a courtroom.

LEGAL ISSUES RAISED BY JUDGE BROADMAN

1. The Motion for a New Hearing

Judge Broadman's brief before the Commission and his Motion for a New Hearing assert various theories of denial of due process or unfairness. The Motion for New Hearing was not filed with the Masters, nor was it filed with the Commission until months after the hearing had been completed. The facts set forth in the motion relate to events that occurred during the hearing. There is no claim of newly discovered evidence. No affidavits were filed in support of the motion. (See Code Civ. Proc., section 658.) While the motion is critical of two of the Special Masters, it does not set forth justiciable grounds for their disqualification. Finally, the motion fails to comply with Rule 916 regarding the taking of new evidence. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 341.)

The motion for a new hearing is denied. The Commission's vote was unanimous.

2. The Motion to Disqualify Commissioner Masterson

Judge Broadman also filed on June 25, 1996 (the day before oral argument) a motion to disqualify the Chair of the

Commission from further participation based upon two facts: that the Chair had signed the Third Amended Notice of Formal Proceedings without conducting a personal investigation of the accuracy of the allegations; and that the Chair had directed the Attorney General's office to assert the attorney-client privilege when the privilege applies. The claimed factual basis for the motion is detailed in footnotes 3 and 4 above.

The motion was denied, with ten members participating. The Commission's vote was unanimous.[14]

3. Due Process Issues

The bulk of Judge Broadman's due process and unfair hearing arguments advance a common theme, *viz.*, that the Commission and the Special Masters are biased against him; that the proceedings were unduly delayed; and that he could not obtain a fair hearing. The rules are clear that when a respondent has objections to the Masters' Report or seeks to have findings made:

> . . . The objections and grounds shall be specific and shall be supported by reference to the book and page number of the transcript and all reasons in opposition to the findings as sufficient grounds for censure, removal, retirement, or private admonishment. The statement shall conform in style to subdivision (c)

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14. Justice Masterson, Chair of the Commission, declined to disqualify himself, recused himself from further consideration of the matter, and referred the motion to the Commission for ruling. The Commission, under Vice-Chair Robert Bonner, denied the motion. The Commission's ruling on the matter is set forth in a separate order.

of rule 15. . . . (Rule 913, California Rules of Court (Objections to Report of Masters).)

Most of Judge Broadman's arguments are made without citation to the record and without any apparent basis in fact. They are, therefore, rejected. Where evidentiary grounds are not cited, the Commission will not search the entire record to seek some basis of support.

With respect to the separate contention that there was a delay in the proceeding, there is no evidence cited showing prejudice.[15] (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826-37.) Although Judge Broadman complains that the Examiner was slow to investigate and turn over discovery, the record is silent as to whether, as a factual matter, Judge Broadman suffered any prejudice.

With respect to the charge of bias, the allegations are not supported by citations to the record that would show bias. The references to the mimicking of a black accent are discussed in footnote number 4 above. These facts do not show bias. The WEST Magazine article is not in evidence, and when the Examiner sought to elicit evidence on the subject, Judge Broadman objected on the ground that there was no longer any issue with respect to the matter. The Examiner withdrew the pending question and desisted from further inquiry. (H.Tr. 982-84.)

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15. Four charges of misconduct are sustained. Two arose from Judge Broadman's comments to the press, as to which the facts are not disputed. The third, *Hooks*, arose in January 1995, and the fourth, the *Kralowec* trial, arose in February-March, 1995. The hearing before the Special Masters began in July, 1995.

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Judge Broadman's claims of failure to comply with discovery requests are not supported by evidence in the record. With respect to Judge Broadman's complaint that interview notes of the witness Richey were not produced, the Commission adopts the findings of the Masters.

With respect to the charges of misconduct by the Masters, the record shows that one of the Masters suffered from macular degeneration, which affected his visual ability in bright light. He closed his eyes from time to time during the hearing. Those facts do not establish that he was sleeping, or that he was not paying attention to the proceedings. If Judge Broadman or his counsel wished to make a point of this contention, or to disqualify the Master under section 170.1(a)(7), they failed to make a record that would support review.

Regarding allegations that one of the Masters became biased against Judge Broadman and questioned him aggressively, the Commission has closely reviewed the record. There is no evidence as to how Judge Broadman was prejudiced, assuming that his complaint against the Master had any merit. Judge Broadman did not make timely objections or otherwise make a record on the subject that would support review. Furthermore, based upon the Commission's review of the record, it appears that in the circumstances where counsel raised an objection to interruptions or questions by the masters, the objection was sustained by the Presiding Special Master. (See, e.g., H.Tr. 5042-43.) As with the allegation that one of the Masters was sleeping, this issue was not timely asserted nor was an adequate record made to preserve the objection.

Judge Broadman also asserted by way of Answer that he was free to make comments to the press, despite Canon 3A(6),

as the exercise of reasonable expression under the First Amendment; that the charges are unconstitutionally vague and violate the due process, equal protection and right to confrontation guarantees of the Constitution; that the Commission lacks subject matter jurisdiction; that the proceeding violates Rule 904.2; and in each of the respects so cited violated Judge Broadman's right to due process of law. No evidence was referenced in support of these contentions, and no legal authorities were cited to support them. Accordingly, they are rejected.[16]

Except as noted above, the Commission's vote on due process issues was 7 to 4 to reject Judge Broadman's claims.

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16. Judge Broadman also objects to the Masters' evidentiary ruling expanding the scope of exhibit 52 to include a showing that the accounts receivable list was related to costs, not to attorney Kralowec's share of a potential fee. (Objections, pp. 107-08.) The order overruling the objection on the grounds of relevance is sustained. The exhibit provided background for understanding Judge Broadman's contention that Kralowec was going to commit perjury and that only he could prevent him from doing so.

Judge Broadman's objections to the admission of evidence outside the scope of the Notice, as set forth on pages 109 to 110 of his Objections, were resolved by the Commission's disposition of Counts 1 and 3.

The order overruling Judge Broadman's objection to the testimony of witness Richey is sustained. Regardless of any discovery dispute, Mr. Richey's testimony about the *Sharpe* incident was made admissible by the first question addressed to Mr. Richey by Judge Broadman's counsel and Mr. Richey's answer to that question. See H.Tr. 617.

All other motions or objections that have not been addressed or ruled upon by this decision are denied.

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Of the four Commissioners voting no, three would have found due process violations, but not of a magnitude to warrant dismissal. One Commissioner would have found due process violations, throughout the case, sufficient to support dismissal.

DISCIPLINE RECOMMENDED

Judge Broadman has been found to have committed four separate acts of judicial misconduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In recommending discipline, the Commission is guided by the principle that the purpose of a Commission proceeding "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

Counts 2B and 2C involve public comment on pending cases, at least one of which was a knowing and willful violation of Canon 3A(6) now 3B(9). Both acts were committed after the judge had received an advisory letter from the Commission cautioning him against engaging in such conduct. The interview with Time Magazine was not one forced by the pressure of reporters yelling questions on the courthouse steps, nor the stress of a long trial; it was arranged over the course of several telephone calls with a reporter in New York and took place at a scheduled time in Judge Broadman's home in Tulare County. There is, in the view of the Commission, no room to dispute that Judge Broadman knowingly violated the canon after a warning from the Commission not to do so, and after he had the opportunity for full reflection on the circumstances, the

risks and the benefits. The Commission can find no mitigation or excuse.

Count 3A involves Judge Broadman's efforts to influence the outcome of the pending case of *Metzger v. Kralowec*. The Commission can find no mitigation or excuse for such conduct. Judge Broadman refuses to accept fault in any degree for his actions. His stated reasons for engaging in such conduct, to wit, his belief that the possibility of fraud on the court by attorney Kralowec justifies his interference in the proceedings of that court, are not convincing.

Count 1D, the *Hooks* matter, involves Judge Broadman's conduct in obtaining a time waiver for sentencing through misrepresentation. This is the most serious of the Commission's four findings of misconduct. The aim of the legal system is to ensure fairness and justice for all persons before it. The system will not work if honesty and candor are not practiced by all participants. Judges have a special responsibility to deal honestly and forthrightly with all who appear before them, and when a judge displays a lack of integrity, as did Judge Broadman in *Hooks*, confidence in the entire judiciary is weakened.

The Commission emphasizes that its finding in this regard is *not* directed toward the exercise of discretion in sentencing. To illustrate, the idea that Judge Broadman said he wanted to explore (withholding medical treatment for an HIV positive defendant) would no doubt be viewed by some as inhumane or by others as bizarre. Others might feel differently. The Commission's view (or the views of independent Commissioners) on the judge's "idea" are not germane. What is germane, and the focus of the finding of misconduct, is the deception practiced by the judge on a lawyer and his client for

the purpose of securing time to further consider his idea. It is that conduct, and not the entertaining of his idea or the exercise of any discretion, that the Commission finds as conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Judge Broadman presented some 20 witnesses to testify regarding his industry, inventiveness, and other contributions to the judiciary. Although the Commission does not minimize those contributions, their value in a disciplinary proceeding is limited.

> The foregoing evidence of petitioner's qualifications for and contribution to the judicial system, during the course of a lengthy judicial career, does not mitigate or excuse petitioner's wilful misconduct or prejudicial conduct. [citation omitted] We may, however, and do take these factors into account in considering the totality of the circumstances that are pertinent to our determination of the appropriate discipline. [citation omitted] (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 911-12.)

As the Supreme Court explained in removing Judge Kloepfer for a persistent pattern of abuse and arbitrary conduct:

> Several witnesses, including colleagues on the bench and attorneys who appear before him, testified that petitioner is a person of unquestioned honesty and integrity. None of the charges against petitioner suggest otherwise. This evidence, and that which confirms that petitioner had a good reputation for

> legal knowledge and administrative skills are not mitigating, however. [footnote omitted] Honesty and good legal knowledge are minimum qualifications which are expected of every judge. (Cal. Code Jud. Conduct, canons 1 and 3.) Neither these qualities nor a judge's administrative skills can mitigate either "wilful misconduct" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.)

Appropriate mitigation in this case would have been a prompt and candid acceptance of responsibility by Judge Broadman for his conduct. While there are occasions in the record where Judge Broadman seems to realize this principle of mitigation, they are obscured by many other instances where he manifests a refusal to accept any responsibility for his conduct. For example, when questioned as to whether the waiver he obtained in the *Hooks* case "was a nothing deal" in Judge Broadman's words, he went on to state: "My testimony is that I did not intentionally deceive Mr. Hooks or Mr. Rothbaum, and my testimony is further that you have no evidence that I did it and you knew before you filed the charges that you had no evidence." (H.Tr. 5084-85.)

As noted, the transcripts of the hearings of January 5th and 9th provide clear and convincing evidence that Judge Broadman deceived both Hooks and his lawyer and that such conduct violated the Code of Judicial Conduct. Rather than offering mitigating evidence of an understanding and willingness to abide by the canons, Judge Broadman's attitude is that he has done no wrong, that there is no need for

improvement and that, for some reason, the Commission is out to get him. That attitude is distressingly similar to that displayed by a respondent judge removed by the Arizona Supreme Court, *viz.*:

> We are also dismayed by the tone and substance of Respondent's communications to the court. . . . Respondent made wild, unsubstantiated claims of conspiracy and revenge. . . .
>
> Respondent's accusations only confirm that he lacks the judgment needed to carry out his duties competently. Respondent blames the world for his troubles, refuses to see his own shortcomings, and, consequently does nothing to cure them. (*In re Peck* (1994) 177 Ariz. 283, 289-90, 867 P.2d 853, 859-60.)

CONCLUSION

The Commission recommends to the Supreme Court that Judge Howard R. Broadman be publicly censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute as described above.

The vote of the Commission on recommending public censure was as follows:

Public Censure: 8 ayes and 3 noes. (Those commissioners voting no would have voted to impose private discipline.)

Appendix C

Dated: August 22, 1996

By direction of the Commission,

s/ Roland W. Selman
Roland W. Selman
Commission Counsel